transaction which in fact involves the proceeds of specified unlawful activity with the intent to promote the carrying on of specified unlawful activity . . . shall be sentenced to a fine . . . or imprisonment."

18 U.S.C. § 1956(h)

"Any person who conspires to commit any offense defined in this section . . . shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy."

26 U.S.C. § 7201

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution."

Fed. R. Crim. P. 11(d)(2)(B)

"A defendant may withdraw a plea of guilty or nolo contendere . . . [if] the defendant can show a fair and just reason for requesting the withdrawal."

STATEMENT OF FACTS

Defendant-Appellant James Robertson conducted illicit business transactions with narcotics dealers on his property at least seven times between July 2019 and June 2021. R. at 5–7. Robertson conducted these transactions in view of a pole camera that the government was using as part of a long investigation. R. at 57–59. During the investigation, prosecutors offered to engage in a preindictment plea negotiation. R. at 57. Robertson's attorney recommended that Robertson reject the government's plea offer, and defendant was subsequently indicted

for his illicit transactions. R. at 56, 59. After an unsuccessful motion to suppress evidence, Defendant entered into a plea agreement, pled guilty, switched counsel, and motioned to withdraw the guilty plea alleging ineffective assistance of counsel. R. 49–51. The district court denied the motion. R. at 69.

James Robertson is a resident of Gould City, Gould who engaged in illicit money laundering between the July 2019 and June 2021. R. at 10, 39. Robertson owned a home at 300 Pacific Street, and during a 22-month period he conducted money laundering operations on that property. R. at 40.

Special Agent Adrian Reyna is an investigator for the FBI who orchestrated the investigation into Robertson's illicit dealings. R. at 17–20. Reyna procured an advanced camera from a friend and set it on a pole near Robertson's home after receiving approval from his supervisors. R. at 18–20. Reyna collected evidence of Robertson's crimes, and turned over the information over to AUSA Carli Zimelman. R. at 19–20.

AUSA Zimelman opened a grand jury investigation into James Robertson on February 3, 2021. R. at 23. The grand jury subpoenaed bank documents and other information related to the investigation. Id.

On May 18, 2021, AUSA Zimelman sent a letter to Robertson regarding the grand jury investigation. R. at 58. The letter

offered Robertson the opportunity to testify before the grand jury, and it offered the opportunity to engage in plea negotiations. Id. The letter noted that the government anticipated possibly bringing charges against Robertson "in the near future." R. at 52–53. Robertson received the letter and informed his attorney, Joy Chen, that he did not want to testify, but he might be interested in a plea negotiation. R. at 49. Robertson, however, continued to tell Chen that he was not guilty. Id.

Joy Chen is an attorney that has advised Robertson on numerous matters over the past 18 years. R. at 13. Chen met with AUSA Zimelman to discuss a potential plea negotiation. Id. AUSA Zimelman orally mentioned that if Robertson pled guilty in the next two weeks, the government would be willing to allow him to plead guilty to a single count of tax evasion, stipulate that his illicit earnings totaled $200,000, and recommend the low end of the sentencing guidelines. R. at 56.

Chen did not believe she could assess the plea deal's value, and she asked AUSA to provide preindictment discovery. R. at 56. AUSA Zimelman refused to provide preindictment discovery because documents were not yet prepared and preparing for discovery would undermine the time and effort benefit to a preindictment plea negotiation. R. at 56. While AUSA Zimelman has not provided preindictment discovery before and the practice

is rare, this refusal left Chen reliant on Defendant's claims of innocence when conducting her analysis. R. at 59, 54, 56.

Chen explained the basic terms of the potential plea to Robertson, and she told him the government wanted him to plead guilty to a single count of tax evasion. Id. Chen also explained to Robertson that tax charges often carry a lesser sentence than money laundering, and she informed Robertson that she was not able to determine the value of the offer because she did not have discovery information. Id. Without the discovery information, and based on Robertson's claims of innocence, Chen recommended that Robertson not accept the offer. R. at 56. Robertson did not accept the offer. R. at 56.

After Robertson denied the potential plea agreement, AUSA Zimelman undertook additional investigatory steps, working with the FBI to obtain a new search warrant to search Robertson's home. R. at 59. The warrant was supported by an affidavit which relied on evidence obtained by a pole camera. R. at 24. After searching the home, AUSA Zimelman asked the grand jury to issue an indictment charging Defendant Robertson with one count of conspiracy to commit money laundering seven counts of money laundering, and two counts of tax evasion. Id.

On June 10, 2021, Robertson was arrested. R. at 64. The next day, he was arraigned on a complaint charging him with one count of conspiracy to commit money laundering. Id.

The grand jury returned the indictment, charging Robertson with one count of conspiracy to commit money laundering, seven counts of domestic money laundering, and two counts of tax evasion. Id. The matter was set for trial. Id. After the indictment, Chen reviewed discovery material, and filed a timely motion to suppress the evidence on the grounds that it was obtained by an illegal search. R. at 59. The motion was dismissed. R. at 69.

Chen reached out to AUSA Zimelman to pursue a plea agreement. R. at 59. AUSA Zimelman submitted a formal plea agreement offer in writing that would require Robertson to plead guilty to one count of conspiracy to commit money laundering and one count of tax evasion. Id. In the agreement, Robertson retained the right to appeal the denial of his motion to suppress evidence. R. at 46. In exchange, Robertson was promised an anticipated sentence of 78–97 total months. R. at 50. Robertson accepted the plea agreement. R. at 47.

After accepting the plea, but before sentencing, Robertson fired his attorney, and he hired Elle Infante as her replacement. R. at 51. Infante, after reviewing Chen's notes on the preindictment plea deal, recommended that Robertson file a motion to withdraw his guilty plea on the grounds that he received ineffective assistance of counsel. Id. He made this

motion, and the court denied it on the grounds that his Sixth Amendment rights had not yet attached. Id.

SUMMARY OF ARGUMENT

This Court should reverse the Twelfth Circuit's order to vacate and remand because the right to counsel does not attach during preindictment plea negotiations. The Court has consistently held that this right to counsel cannot attach to proceedings that occur before the commencement of formal judicial proceedings. The Court should affirm this precedent and explicitly redraw a bright line for Sixth Amendment attachment at the first formal criminal charging proceeding because that clear rule reflects the text and purpose of the Sixth Amendment, it aligns with the beginning of the adversarial process, and it provides clear guidance for courts and states.

Applying the bright-line rule, Robertson's Sixth Amendment right to counsel did not attach during his preindictment plea negotiations because these negotiations occurred before any formal proceedings. Even if the Court abandons the bright-line rule, the right to counsel will not attach during Robertson's preindictment plea negotiations because even under a case-by-case approach this matter was still in the investigatory stage during the offer to negotiatene. Thus, the right to counsel did not attach to Robertson's preindictment plea negotiations.

Even if Robertson has a right to counsel, he was not prejudiced by ineffective assistance of counsel because Joy Chen's conduct was sufficient. To prove ineffective assistance of counsel, a defendant must show that the attorney's conduct fell below objective standards and that the defendant was prejudiced by the attorney's conduct. Chen met objective standards of reasonableness because her actions fell within the wide range of acceptable conduct. Chen presented the government's offer to Robertson, explained the relative punishment for the charge, and counselled him despite the limited available information.

To show prejudice resulting from a rejected plea offer, Robertson must show that he would have accepted the plea offer. Robertson cannot show that he would have accepted because at the time of the offer, he actively maintained his innocence. Furthermore, there is no evidence that the prosecutor or judge would allow the offer to go into effect. Thus, Robertson cannot prove ineffective assistance of counsel due also to a lack of prejudice.

Without proving that his Sixth Amendment right attached, and without proving he was prejudiced by ineffective assistance of counsel, there was no reason to allow a withdrawal of Robertson's guilty plea pursuant to Fed. R. Crim. P.

11(d)(2)(B). The Court should accordingly reverse the Twelfth Circuit's decision to vacate the ruling of the district court.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED ROBERTSON'S MOTION TO WITHDRAW HIS GUILTY PLEA BECAUSE A BRIGHT-LINE RULE IS THE PROPER STANDARD FOR DETERMINING HIS RIGHT TO COUNSEL HAD NOT ATTATCHED

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. The Amendment's specific language limits its applications to the context of an "accused" during a "criminal prosecution." See Rothgery v. Gillespie Cnty, 554 U.S. 191, 214 (2008) (J. Alito concurring). To enforce these textual limitations, the Court determines whether a defendant's Sixth Amendment rights have attached as a threshold matter before addressing whether the rights were violated. See Id. at 212 (distinguishing the question of attachment from the critical stage inquiry). Outside of this narrowly defined right to counsel, other Amendments protect individuals from government investigation. See Escobedo v. Illinois, 378 U.S. 478 (1964).[1]

[1] Escobedo, a case in which the Court held that the right to counsel attached during a preindictment interrogation, was originally decided on Sixth Amendment grounds, but it has subsequently been read to support the Fifth Amendment right to counsel. See Johnson v. New Jersey, 384 U.S. 719 (1966).

Here, the district court properly denied Robertson's motion to withdraw a guilty plea based on ineffective assistance of counsel because criminal proceedings had not commenced when Robertson was negotiating for a plea deal. Therefore, Robertson's Sixth Amendment right to counsel had not attached, and the district court did not abuse its discretion.

A. Standard Of Review

A district court's denial of a motion to withdraw a guilty plea is reviewed for abuse of discretion. United States v. Conroy, 567 F.3d 174, 177 (5th Cir. 2009). The district court has the discretion to grant a motion to withdraw a guilty plea for "any fair and just reason" pursuant to Rule 11(d)(2)(B) of the Federal Rules of Criminal Procedure. Fed. R. Crim. P. 11(c)(1)(B). A Sixth Amendment violation would be a sufficient reason, and whether the Sixth Amendment right to counsel attaches during preindictment plea negotiations is a question of law which is reviewed de novo. United States v. Moody, 206 F.3d 609, 613 (6th Cir. 2000).

B. The Court Should Enforce a Bright-line Rule That the Right To Counsel Does not Attach Until Formal Criminal Charging Proceedings Because the Sixth Amendment's Purpose and Text Limit Its Application to Protect the Accused During Criminal Proceedings, the Parties Have Not Become Adversarial Before A Formal Proceeding, And this Rule Provides Clear Guidance To the States.

The Court has consistently reinforced a rule that a defendant's Sixth Amendment right to counsel attaches "only at

or after the time that adversary judicial proceedings have been initiated against him." Kirby v. Illinois, 406 U.S. 682, 688 (1972). The Court has identified this time as the "first formal charging proceeding" which may include a formal charge, preliminary hearing, indictment, information, or arraignment. Moran v. Burbine, 475 U.S. 412, 428–29 (1986). This rule "forecloses" the application of the Sixth Amendment to events "before the initiation of criminal proceedings." United States v. Ash, 413 U.S. 300, 303 n.3 (1973). Lower courts have adopted this rule and referred to it as a "bright-line rule" that clearly marks formal criminal charging proceedings as the point of attachment for the right to counsel. See, e.g. United States v. Turner, 885 F.3d 949 (6th Cir. 2018). But see, e.g. United States v. Larkin, 978 F.2d 964, 969 (7th Cir. 1992)(holding that precedent created only a rebuttable presumption that the right attaches at formal proceedings).

1. The Bright-Line Rule Properly Reflects the Purpose and Text of the Sixth Amendment by Ensuring the Protection of an Accused During Criminal Proceedings and Trial.

The "core purpose" of the Sixth Amendment's guarantee of counsel is "to assure aid at trial." Gouveia, 467 U.S. at 188 (citing Ash, 413 U.S. at 309). In Gouveia, the Court considered whether the right to counsel attached during the administrative separation of an inmate that occurred before any formal charge.

See Gouveia, 467 U.S. 180. The Court maintained that the Sixth Amendment does not attach until after the "initiation of adversary judicial proceedings" because drawing the line there ensures the purpose of the Amendment is served by protecting defendants at trial without needlessly providing individuals with a "preindictment private investigator." Id. at 187, 191.

Additionally, the Amendment's plain language limits the right to "all criminal prosecutions." U.S. Const. Am. VI. This language was carefully chosen to contrast with the language "any criminal case" which is operative in the Fifth Amendment. U. S. Const. Am. V. See Rothgery, 554 U.S. at 222 (J. Thomas dissenting) (citing Counselman v. Hitchcock, 142 U.S. 547 (1892)). These linguistic distinctions emphasize the Sixth Amendment's focus on protecting defendants at trial, while the Fifth Amendment extends to protect individuals from questioning in preindictment situations. Id. For example, in Moran v. Burbine, 475 U.S. 412, 430–31 (1986), the Court confirmed that the right to counsel did not attach during preindictment police questions because "its [the Sixth Amendment's] purpose" and "its very terms" confirm the teaching that the right "does not attach until after the initiation of formal charges," and the relevant questioning came before that clear point.

The Court should apply a bright-line rule because that rule protects an accused at trial in accord with the purpose and text

of the Amendment. Like in Gouveia, in which the Court adhered to the text and purpose of the Sixth Amendment by refusing to extend protections to preindictment proceedings, the bright-line rule respects the Sixth Amendment's purpose by ensuring that the right to counsel applies during criminal proceedings but only after they have begun. Furthermore, like the Court's approach in Gouveia, this rule avoids establishing a "preindictment private investigator" by preventing attachment before formal proceedings.

The bright-line rule is also proper because it reflects the textual limitations of the Sixth Amendment. Like the Court's approach in Moran, in which it relied on the text of the Sixth Amendment when enforcing a clear rule limiting attachment to interrogations *after* initial formal criminal proceedings, the bright-line rule respects the Amendment's textual commitment to an accused and a trial by limiting the right to counsel. Thus, bright-line rule reflects the text and purpose of the Amendment.

2. The Bright-Line Rule Accurately Identifies the Filing of Proceedings as the Point at Which the Prosecution's Case Solidifies, the Parties Become Adversarial, and Defendants Require Counsel.

The focus of initiation of criminal proceedings is not "mere formalism" because it marks at which the "adverse positions of government and defendant have solidified." Kirby, 406 U.S. at 689. Before the initiation of criminal proceedings,

there is not as much need for counsel because the government has not completed its investigation, become adversarial, and the prosecution has not "committed itself to prosecute." Id. For example, in Rothgery, the Court considered an initial arraignment before a judge, and the Court found that the Sixth Amendment attached at these judicial proceedings because this is the point when the "State's relationship with the defendant has become solidly adversarial." 554 U.S. at 202.

Here, the Court should enforce the bright-line rule because it aligns with the point at which the prosecution's case has solidified and the parties become adversarial. The bright-line rule's focus on the formal judicial proceedings identifies this critical difference in the position of the prosecution before and after the initiation of criminal proceedings. Like the Court's approach in Rothgery, in which the Court looked for a formal judicial proceeding to identify whether the Sixth Amendment right attached because the it showed the prosecution's commitment to prosecute and the adversarial position of the parties, the bright-line rule also looks at the initial formal proceeding as a commitment to prosecute that makes the parties adversarial. Thus, the Court should apply the bright-line rule because it accurately marks where the prosecutor has become adversarial, and counsel is needed.

3. A Bright-Line Rule Provides Clear and Actionable Guidance for the States That Rely on this Rule.

States rely on the consistency of this precedent as a clear rule when establishing programs that provide counsel to indigent defendants. See Rothgery, 554 U.S. at 203–05, n.14. States are required to provide counsel to indigent defendants when the right to counsel attaches. See Gideon v. Wainwright, 372 U.S. 335 (1963). When crafting legislation to meet this obligation, the District of Columbia and 43 States haven take steps to appoint counsel "before, at, or just after initial appearance." Rothgery, 554 U.S. at 203–05, n.14. For example, in California, the Penal Code has been crafted to ensure that a defendant has counsel beginning "[w]hen the defendant first appears for arraignment." Cal. Penal Code § 858(a)(2022).

The Court should employ the bright-line rule and refuse to stretch the Sixth Amendment's protections because states rely on the rule's clarity when the crafting public defense programs. At any point, individual states could choose to extend public defense programs to pre-criminal proceedings, but the majority of states, including California, align the start of their programs with the bright-line rule. This reliance shows consensus on both where the line should be drawn and the rule's workability. Without a well settled bright-line rule connected to formal proceedings, states would need to recraft their

policies to investigate individual situations and determine when to provide counsel. This is far more onerous and unworkable. Thus, the court should follow the bright-line rule because its clarity provides the basis for state programs.

In sum, the Court should apply the bright-line rule because it reflects the text and purpose of the Sixth Amendment, it marks the point when the parties can be truly adversarial, and many states consistently rely on this rule.

C. Robertson's Sixth Amendment Right to Counsel Did Not Attach During His Preindictment Plea Negotiations Because the Negotiations Came Before Formal Charges.

Under the bright-line rule, the Sixth Amendment attaches only "after the initiation of formal charges." Moody, 206 F.3d at 614 (citing Moran, 475 U.S. at 431.). Formal charges include arrests, indictments, and arraignments. Kirby, 406 U.S. at 689. On the other hand, less formal procedures like target letters and plea offers do not qualify as formal judicial proceedings. See United States v. Hayes, 231 F.3d 663 (9th Cir. 2000)(en banc)(Target Letters). For example, in Hayes a suspect was served with a target letter indicating that the government might seek indictments against him, but his Sixth Amendment rights had not yet attached because the prosecution filed no formal charges, the investigation was ongoing, and no charging decisions had been made when the letter was sent. Id. at 669.

A minority of courts recognize potential exceptions to the bright line rule when the government has "crossed the constitutionally significant divide from fact-finder to adversary." Larkin, 978 F.2d at 969. Because there is still a presumption that that the right does not attach, such situations must be "extremely limited." Roberts v. Maine, 48 F.3d 1287, 1291 (7th Cir. 1995). For example, in Roberts, a court considered whether forcing a suspect take a blood test crossed that line. Id. The circuit court found that the government had not crossed the line because the police were still waiting on the outcome of their investigation. Id.

Here, the right to counsel did not attach during Robertson's preindictment plea negotiations because formal criminal proceedings had not been filed. Like in Hayes, in which the right to counsel did not attach during preindictment plea negotiations because the prosecution had not brought formal charges, the right to counsel did not attach during Robertson's preindictment plea negotiations because AUSA Zimelman had not yet brought formal charges against Robertson. Also like in Hayes, in which a prosecutor's target letter did not trigger Sixth Amendment attachment because it only hinted at possible charges, AUSA Zimelman's letter does not trigger Sixth Amendment attachment because and her letter only vaguely alluded to potential future charges. Thus, under the bright-line rule,

Robertson's Sixth Amendment right to counsel did not attach during his preindictment plea negotiations.

Even if the Court applied the rule used by a minority of courts, Robertson's Sixth Amendment did not attach because the government was still an investigator. AUSA Zimelman's letter to Robertson invited him to testify. After negotiations ended, AUSA Zimelman continued to investigate and worked with the FBI to get another search warrant. Finally, AUSA Zimelman noted that she could not produce discovery because that would require an assembly of evidence that she had not yet completed. Like in Roberts, in which the Sixth Amendment did not attach because the proceeding came in the middle of the investigation, Robertson's Sixth Amendment had not attached because the plea negotiations came in the middle of the FBI's ongoing investigation. Thus, Robertson's right to counsel did not attach even under the alternative rule.

In sum, under the bright-line rule, Robertson's Sixth Amendment right to counsel did not attach during preindictment plea negotiations because the government had not brought formal charges. Additionally, under the alternative rule, Robertson's right to counsel did not attach because the government was still investigating.

II. EVEN IF ROBERTSON'S SIXTH AMENDMENT RIGHTS ATTACHED, THE DISTRICT COURT CORRECTLY DISMISSED THE MOTION BECAUSE COUNSEL'S ERRORS DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.

When the Sixth Amendment attaches, it grants the defendant the right to an "effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 687 (1984). To prove that this right has been violated, a defendant must show that (1) counsel's conduct "fell below an objective standard of reasonableness" and (2) that the defendant was "prejudiced" by the deficiency. Id. Reaching this "high bar" is "never an easy task" because judicial scrutiny of attorney performance must be "highly deferential." Padilla v. Kentucky, 559 U.S. 356, 371 (2010).

Here, the district court did not abuse its discretion when it dismissed Robertson's motion to withdraw because Chen's conduct was sufficient and Robertson cannot show that he would have accepted the offer absent Chen's actions.

A. Standard of Review

Although a district court's decision to deny a motion to withdraw a guilty plea is reviewed for abuse of discretion, the Court would necessarily abuse its discretion if there was a valid claim for ineffective assistance of counsel. Conroy, 567 F.3d at 177. Claims of ineffective assistance of counsel are

reviewed du novo. Chandler v. United States, 218 F.3d 1305, 1312 (11th Cir. 2000).

B. Chen's Representation of Defendant was Not Deficient Given That She Adequately Informed Him of the Benefits of the Potential Plea Agreement and Her Concerns.

While there are few standards of reasonableness in negotiations, if the prosecution makes a "formal" offer favorable to the defendant, then defense counsel must "communicate" it to the defendant. Missouri v. Frye, 566 U.S. 134, 145 (2012). Defense counsel need only inform a defendant "of the advantages and disadvantages" of that potential plea agreement. Libretti v. Unites States, 516 U.S. 29, 50 (1995). For example in Parsley v. United States, 604 F.3d 667, 672 (1st Cir. 2010), the court considered claims that counsel failed to meet objective standards because they did not urge a defendant to plead guilty, but the court denied the claim because counsel conveyed the agreement, explained the advantages, and made a "reasonable strategic choice" based on an evaluation of the discovery materials. Furthermore, the Court in Burt v. Titlow, 571 U.S. 12, 22 (2013), found that a defendant's proclamation of innocence "may effect the advice that counsel gives." Finally, in Frye, a defense counsel's conduct fell outside the scope of acceptable conduct because counsel received a formal written and defined plea offer, and counsel completely failed to mention the offer to the defendant. 566 U.S. at 145.

Here, Chen's conduct was sufficient because she adequately informed him about the nature of the prosecution's plea offer and the ambiguities surrounding it. Like in Parsley and Burt, in which defense counsel met objective standards by making a reasonable reccomendation based off discovery materials and the defendant's claimed innocence, Chen relayed the basic terms of the agreement, conveyed the relative punishment for the guilty plea, and explained her reasonable hesitance to accept a deal given the lack of discovery and Robertson's claims of innocence. Unlike the offer in Frye, which was written down with specific parameters, Chen was orally told of an offer in which prosecution "would be willing to allow him to plead to" a single count and a recommended sentence "on the low end." Because of the vague nature of the plea, there was no way for Chen to know the advantages and disadvantages of that strategy. Thus, Chen's conduct was effective to the best of her abilities given the limited access to information and Robertson's proclaimed innocence.

C. Even if Chen's Actions Were Ineffective, Robertson Was Not Prejudiced by the Acts of Counsel Because He Maintained Innocence at the Time of the Negotiation and the Agreement is Too Indefinite to Show That the Agreement Would Have Been Accepted.

To show prejudice from alleged ineffective assistance of counsel when the defendant rejects a plea agreement, the defendant must show that the "end result" of the criminal

process would have been "more favorable." Frye, 566 U.S. at 147. To show this, the defendant must show that there was a reasonable probability that (1) they would [have] accept[ed] the earlier plea offer" had counsel been effective, (2) the prosecution would not have withdrawn the offer, and (3) the judge would block its acceptance. Id. See also, Lafler v. Cooper, 566 U.S. 156 (2012).

Here, while prosecutors and judges have discretion, Robertson may be able to show a reasonable probability that prosecution would have kept the offer open, and that the court would have accepted the agreement. Nonetheless, he cannot prove prejudice because he cannot show that he would have accepted the offer.

1. Robertson Cannot Prove That He Would Have Accepted the Offer Because He Was Maintaining His Innocence and the Offer Was Ambiguous.

To prove prejudice when counsel failed to communicate a plea offer, a defendant must show a "reasonable probability" that they would have accepted the plea offer. Frye, 566 U.S. at 148 (2012). A defendant's later decision to accept a less generous plea offer is "insufficient to demonstrate" that a defendant would have pleaded guilty to an earlier, more favorable plea. Id. at 150. Additionally, a defendant's later claims that he would accept a plea negotiation is subject to heavy skepticism. United States v. Day, 969 F.2d 39, 46 n.9 (3rd Cir. 1992). For example, in Merzbacher v. Shearin, 706 F.3d 356, 360 (4th Cir.

2013), a defendant's counsel never communicated a plea offer to the defendant who later claimed he would have accepted the offer. Nonetheless, the defendant could not show that he was prejudiced because the plea offer's indefiniteness and the defendant's continued maintenance of his own innocence made his post hoc testimony less credible and prevented him from establishing a "reasonable probability" that he would have accepted the offer. Id. at 366–67.

Here, Robertson cannot prove that he would have accepted the offer because the offer was indefinite and, at the time of the negotiation, he was still alleging his innocence. Although Robertson mentioned that he was interested in pursuing a plea negotiation, he told Chen that he was "not guilty of money laundering." Like in Merzbacher, in which a defendant's maintenance of his innocence and the imprecision of the offer prevented the defendant from later alleging he would have accepted the offer, Robertson's maintenance of his innocence and his inability to assess the strength of the government's case at the time of the offer prevents him from proving that he would have accepted the offer. Without a reasonable probability that he would have accepted the offer, there is no prejudice, and Robertson cannot prove ineffective assistance of counsel.

CONCLUSION

The Court should reverse the ruling of the Twelfth Circuit because the right to counsel does not attach during preindictment negotiations, and even if it did, Robertson cannot prove ineffective assistance of counsel. Without proving both, Robertson cannot assert a fair and just reason to withdraw his plea, and his motion to withdraw was correctly dismissed by the district court.

DATED: December 15, 2022

Respectfully Submitted,
Student Attorney
Co-Counsel for Respondent

Applicant Details

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June 9, 2023

The Honorable Judge Jamar K. Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
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Dear Judge Walker:

Please accept this letter as an application for a clerkship in your chambers for the 2024-2025 term. I am a recent graduate of the University of Oklahoma College of Law. I am sitting for the Oklahoma bar examination in July 2023. I have accepted a litigation associate position with Crowe & Dunlevy's Oklahoma City office which I will start in September 2023 (pending bar examination results).

I plan on practicing complex business litigation. I am primarily interested in clerking in your chambers because of the Eastern District's fast-moving docket and so that I can gain exposure to a wide variety of cases. I believe that I would make a strong addition to your chambers because of my ability to work well under pressure. I served as a team member on my BLSA chapter's Moot Court both my second and third years of law school. I was able to consistently stay within the Top Ten percent of my class while doing so. Additionally, I served as an Articles Editor on my school's Oil and Gas, Natural Resources, and Energy Journal. I believe these experiences show my ability to stay focused and simultaneously juggle multiple time-intensive responsibilities.

Attached for your review are my resume, transcript, letters of recommendations, and writing sample. My letters of recommendation are from Professors M. Alexander Pearl (510-684-7636), Stacey Tovino (832-289-6313) and Dean Melissa M. Mortazavi (510-290-8155).

My writing sample is an excerpt from a brief that was submitted for SWBLSA's Thurgood Marshall Moot Court competition in 2022. The overall brief received the Best Petitioner Brief award at the competition. The excerpt represents my contribution to the overall brief before edits were made for the final submission. The excerpt is wholly my work product and has not been edited by any other parties.

Please let me know if I can provide any additional information. I can be reached by phone at 405-313-1811 or by email at msmith170111@gmail.com. Thank you very much for considering my application.

Respectfully,
Mylon D. Smith

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GableGotwals — Oklahoma City, OK
Summer Associate — Summer 2021 & 2022
Researched and drafted legal memoranda in the areas of oil and gas, bankruptcy, labor and employment, and insurance. Observed scheduling conference in federal court. Observed sentencing of criminal defendant in federal court.

Crowe & Dunlevy — Oklahoma City, OK
Summer Associate — Summer 2021 & 2022
Drafted reply brief in support of client's motion to dismiss a fraudulent transfer claim. Drafted discovery requests in a Chapter Seven bankruptcy proceeding. Researched and drafted legal memoranda in the areas of health law, cybersecurity, commercial law, professional ethics, environmental law, antitrust, labor and employment, and remedies. Drafted loan agreement for credit extension for client. Observed depositions.

Fish City Grill — Edmond, OK
Bartender/Server — October 2017 – June 2020

ADDITIONAL INFORMATION

Community Service: American Cancer Society, Legislative Ambassador (2022-present).

Interests: Half-marathons, cycling, playing chess, reading mystery novels, concertgoing, and Game of Thrones (books and television series).

THE UNIVERSITY OF OKLAHOMA COLLEGE OF LAW

OFFICE OF ADMISSIONS AND RECORDS

NAME (LAST, FIRST MIDDLE)
Smith, Mylon D

SOONER ID
113048426

SEX
M

BIRTH DATE
03/23/1996

Student Record

PRINT DATE
06/06/2023

COURSE TITLE	DEPT.	NO.	HRS.	GRADE
Fall 2020				
Civil Procedure I	LAW	5103	3	A
Research/Writing & Analysis I	LAW	5123	3	B-
Torts	LAW	5144	4	A-
Property	LAW	5234	4	A
Legal Foundations	LAW	6100	1	S
TERM: **GPH:** 14 **GPS:** 138 **HA:** 15 **HE:** 15 **GPA:** 9.857				
Spring 2021				
Contracts	LAW	5114	4	A
Constitutional Law	LAW	5134	4	A-
Intro to Brief Writing	LAW	5201	1	B+
Civil Procedure II	LAW	5203	3	B
Criminal Law	LAW	5223	3	A-
Oral Advocacy	LAW	5301	1	A
TERM: **GPH:** 16 **GPS:** 158 **HA:** 16 **HE:** 16 **GPA:** 9.875				
Fall 2021				
Evidence	LAW	5314	4	A-
The First Amendment	LAW	5450	3	A
Unincorporated Entitities	LAW	5733	3	B+
International Law Foundations	LAW	6060	3	A
ONE J	LAW	6331	1	S
TERM: **GPH:** 13 **GPS:** 133 **HA:** 14 **HE:** 14 **GPA:** 10.231				
Spring 2022				
Professional Responsibility	LAW	5323	3	A-
Administrative Law	LAW	5403	3	A
Bankruptcy	LAW	5410	3	A-
Health Care Access/Qual/Liab	LAW	6100	3	A
Statutory Interpretation	LAW	6100	3	A-
Competitions	LAW	6321	1	S
ONE J	LAW	6331	1	S
TERM: **GPH:** 15 **GPS:** 156 **HA:** 17 **HE:** 17 **GPA:** 10.4				
Fall 2022				
Secured Transactions	LAW	5750	3	A-
Equality Rights/Amer Con Law	LAW	6100	3	A-
Litigation Skills	LAW	6400	3	A
Health Data Confid./Security	LAW	6100	3	A
TERM: **GPH:** 12 **GPS:** 126 **HA:** 12 **HE:** 12 **GPA:** 10.5				
Spring 2023				
Crim Pro: Investigation	LAW	5303	3	A-
Federal Courts	LAW	5543	3	A-
Federal Indian Law	LAW	5610	3	A-
Selected Issues Antitrust Prac	LAW	6100	3	B
Competitions	LAW	6321	1	S
Trial Techniques	LAW	6410	3	A-
TERM: **GPH:** 15 **GPS:** 144 **HA:** 16 **HE:** 16 **GPA:** 9.6				

	GPH	GPS	HA	HE	GPA
OU CUM:	85	855	90	90	10.059

..... END OF RECORD .....

INTERPRETATION OF GRADES

I = Incomplete
AW = Admin. Withdrawal
W = Withdrawn
S = Satisfactory
U = Unsatisfactory
AU = Audit
N = No Report

GRADE POINTS PER SEM. HOUR

A+ = 12 C+ = 6
A = 11 C = 5
A- = 10 C- = 4
B+ = 9 D+ = 3
B = 8 D = 2
B- = 7 D- = 1
F = 0

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ELECTRONIC VERSION

Dean and Director of the Law Center

This official transcript is printed on burgundy security paper and signed in **DUPLICATE** (pre-printed signature in white ink and laser produced identical signature in black ink) on each page by the Dean of the University of Oklahoma College of Law, Andrew M. Coats. A raised seal is not required. When photocopied, the word **COPY** should appear. A BLACK AND WHITE OR COLOR COPY OF THIS TRANSCRIPT SHOULD NOT BE ACCEPTED.

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The University of Oklahoma

COLLEGE OF LAW

June 9, 2023

Re: Letter of Recommendation: Mr. Mylon Smith

Dear Judge:

It is with exceptional enthusiasm that I give my highest recommendation of Mr. Mylon Smith for a judicial clerkship. As background, I serve as the William J. Alley Professor of Law and Director of the Graduate Healthcare Law Programs and teach a range of introductory and upper-level health law courses at the University of Oklahoma College of Law (OU Law). Mr. Smith was a student in my Health Care Access, Quality, and Liability course (Spring 2022) and my Health Data Confidentiality and Security course (Fall 2022) at OU Law. As discussed in more detail below, Mr. Smith is an absolutely outstanding student and I could not recommend him more highly for a judicial clerkship.

I was first introduced to Mr. Smith during the Spring 2022 semester when he enrolled in my Health Care Access, Quality, and Liability course at OU Law. This course examined a variety of legal issues relating to health care access, quality, and liability, including: (1) health care access, including the boundaries of the physician-patient relationship and the requirements of the federal Emergency Medical Treatment and Active Labor Act (EMTALA); (2) telemedicine, including its ability to improve health care access and lower health care costs; (3) health insurance access, including the insurance access reforms set forth in the Affordable Care Act (ACA) and litigation relating thereto; (4) the doctrine of informed consent to treatment, including state-specific disclosure standards and form requirements; (5) access to medical records, patient privacy, and health information confidentiality; (6) the principles of public health law; (7) mechanisms for maintaining and improving health care quality, including professional and institutional licensure, certification, accreditation, and credentialing; (8) medical staff membership, clinical privileges, medical staff bylaws, medical staff rules and regulations, physician peer review, peer review immunities, peer review privileges, and the procedural requirements set forth in the federal Health Care Quality Improvement Act (HCQIA) and analogous state laws, and the National Practitioner Data Bank (NPDB); (9) health care access, quality, and liability issues raised by the treatment of patients with limited English proficiency (LEP) and related requirements of Title VI of the Civil Rights Act; (10) liability of health care professionals, including privileges and defenses; (11) volunteer immunity for health care providers under federal and state law; and (12) liability of health care institutions.

I used a mix of lecture and the traditional Socratic method to teach Health Care Access, Quality, and Liability. I remember calling on Mr. Smith to present a variety of judicial opinions and other materials during this course. Mr. Smith easily demonstrated that he had read, understood, and critically analyzed the readings. I also remember that Mr. Smith was exceptionally prepared for

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The University of Oklahoma

COLLEGE OF LAW

class, had perfect attendance throughout the semester, and had a unique ability to apply the principles from the readings to hypothetical fact patterns as well as to current issues in health law. Although final examination grading was anonymous, I later learned that Mr. Smith earned an exceptionally high grade (an "A") in this curve course. Based on his performance during the semester, I was not surprised.

Mr. Smith also enrolled in my Fall 2022 Health Data Confidentiality and Security course. This course focused on the privacy, security, and breach notification rules that promulgate the Administrative Simplification provisions of the Health Insurance Portability and Accountability Act (HIPAA) as amended by the Health Information Technology for Economic and Clinical Health (HITECH) Act. In this course, Mr. Smith studied: (1) the individuals and entities that fall within the HIPAA Privacy and Security Rules' definitions of covered entities, business associates, and hybrid entities; (2) the definition of protected health information (PHI); (3) methods for de-identifying PHI; (4) the level of patient permission needed before a covered entity may use or disclose protected health information for treatment, payment, health care operations, and public benefit activities; (5) the individual rights; (6) the heightened confidentiality requirements that apply to psychotherapy notes and the particular regulations that apply to fundraising activities; (7) the minimum necessary requirements; (8) the administrative requirements; (9) the requirements relating to business associates, subcontractors, and business associate agreements; (10) the breach notification requirements set forth in the HIPAA Breach Notification Rule; and (11) the administrative, physical, and technical safeguards set forth in the HIPAA Security Rule; and (12) the HIPAA Privacy enforcement process, including the complaint process, the audit process, the technical assistance and voluntary compliance process, the resolution agreement process, civil and criminal penalties, and state attorney general enforcement.

Throughout the semester, I remember noticing that Mr. Smith was able to answer questions about the regulations that other students could not. For example, Mr. Smith could easily identify the regulatory default rule and point to several sub-regulations that provided exceptions to the default rule. Mr. Smith also could quickly scan the lengthy regulatory exceptions and identify the only applicable exception in response to hypotheticals I posed in class. I also noticed that Mr. Smith followed the direction of the class discussion very closely, quickly answering questions that other students would ask me to repeat two or three times. Several times, Mr. Smith was the only student able to answer my question. Although the final examination was a difficult essay examination that required students to spot and thoroughly discuss dozens of complex regulatory issues, I was (again) not surprised to learn that Mr. Smith received an exceptionally high grade (an "A") in this curved class.

Mr. Smith has performed exceptionally well in law school outside my health law classes. Currently in the top 10% of his class, Mr. Smith has received many honors, including Order of Barristers, Crowe and Dunlevy Diversity Scholar, Dean's Honor Roll (five semesters), Distinguished Speaker Award in the OU Law 1L Moot Court Competition, Best Brief in the Thurgood Marshall Moot Court Competition, the Judge Wayne Alley Advocacy Award, Runner-Up in the Southwest Region

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of the Thurgood Marshall Moot Court Competition, and Third Place in the National Thurgood Marshall Moot Court Competition.

In summary, it is with extraordinary pleasure that I give my highest recommendation of Mr. Mylon Smith for a judicial clerkship. I write this recommendation with exceptional enthusiasm, without any reservations, and with the expectation and anticipation that Mr. Smith will flourish as a judicial clerk and be a credit to your court. If you have any questions regarding Mr. Smith's qualifications for a judicial clerkship, please do not hesitate to email me (Stacey.Tovino@ou.edu) or call me (832/289-6313) at your earliest convenience.

Sincerely,

Stacey A. Tovino, JD, PhD
William J. Alley Professor of Law
Director, Graduate Healthcare Law Programs
The University of Oklahoma College of Law

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The UNIVERSITY of OKLAHOMA
College of Law

June 14, 2023

The Honorable Jamar Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Recommendation for Mylon Smith

Dear Judge Walker,

I am writing in enthusiastic support of the candidacy of Mr. Mylon Smith. Mr. Smith is a thoughtful and well-prepared student, with a combination of being a thoughtful, close reader, an intellectually engaged student, and a humble and generous member of the OU Law community. I have the pleasure of not only teaching him in my Administrative Law and Professional Responsibility courses but interacting with him extensively through BLSA in my capacity as BLSA faculty advisor and now as Dean.

In Professional Responsibility and Administrative Law, Mr. Smith was consistently prepared and asked insightful questions. In Professional Responsibility, we often probe the meaning of legal practice and the complex myriad of duties that lawyers must learn to carefully navigate. Mr. Smith is not one to volunteer his thoughts generally—but when called on, his ideas clarified a doctrinal point or meaningfully added a needed perspective to our classroom discussion that enriched the entire classroom experience. Administrative Law is a difficult class, and many people drop the course in the add/drop period. Mr. Smith also excelled in this space where he demonstrated mastery of difficult and complex material and performed well on the final exam.

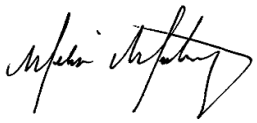
I have not had an extensive opportunity to evaluate Mr. Smith's writing, however, what I have seen on his exams was very good. The flow of the writing followed a natural progression through blackletter doctrine to factual analysis. This was all under a tight time limitation.

Mr. Smith is also a leader in the OU Law community. His work with BLSA, to integrate alumni and connect them to students, has been instrumental in the national recognition of the Chapter. He is also a College of Law 1L Mentor where he helps guide first year students through the multitude of challenges that the transition to law school provides. He is generous with his time and often participates in panel discussion and other student-oriented activities. Not only is he a team player who is both organized and thoughtful, he is a student devoted to making the law a more equitable and just system.

Andrew M. Coats Hall, 300 Timberdell Road, Norman, Oklahoma 73019-5081, PHONE: (405) 325-4699
WEBSITE: LAW.OU.EDU

It is without reservation that I recommend Mr. Mylon Smith to a position in your chambers. I have no doubt that you will find him to be insightful, diligent, and hardworking. If I can provide any additional information to you, I hope you will be in touch.

Sincerely,



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The UNIVERSITY of OKLAHOMA
College of Law

M. Alexander Pearl
Professor of Law
University of Oklahoma
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(510) 684-7636

June 16th, 2023

The Honorable Jamar Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

My name is Alex Pearl and I am an enrolled citizen of the Chickasaw Nation and a Professor of Law at the University of Oklahoma College of Law. It has been a pleasure to have Mr. Mylon Smith in my courses. I write to share my thoughts on Mr. Smith and offer my strongest recommendation in support of his application for a position in your chambers.

Mr. Smith has performed exceptionally as a first-year student in my Property course and again in my upper-division Statutory Interpretation and Federal Indian Law courses. I first met Mr. Smith through the first Property law class in the Fall of 2020. At that time, OU permitted Zoom-based synchronous courses and my Property class was carried out in that manner. My first chance to "meet" Mr. Smith was via his appearance in a video frame on my monitor. I remember his first cold call. He was clear, spoke confidently and carefully, and answered the questions I asked—as opposed to exhibiting the all-to-common first-semester law student trait of wandering around the question. It was immediately impressive, so much so that I carry that memory with me today. Mr. Smith's future performance in the class continued that same trajectory.

In my Property course, students took three multiple choice quizzes and wrote an essay-based final examination. In each component, Mr. Smith was a top four student, out of roughly ninety students. I want to highlight two aspects of his grade in particular. One quiz focused entirely on present and future estates and the dreaded Rule Against

Perpetuities. This quiz, in particular, demands that a student utilize core logical reasoning abilities—very much reminiscent of my graduate training in symbolic logic. Mr. Smith received the highest grade in the class on the quiz—a perfect score. This demonstrates his apex logical reasoning skills and rigor in deploying them to real-world problems. Mr. Smith is a committed analytical thinker. Yet, he is not *simply* a careful thinker. On the written final examination, his writing was clear, well-organized, and thoughtfully structured. In a timed exam, his ability to organize complex legal claims, spot difficult legal issues, and render the correct legal analysis shows his exceptional ability in communicating complexity. Certainly, as a first semester, first year student, Mr. Smith's intellectual and communicative abilities were on full display by receiving the third highest grade in the class.

I next had the opportunity to have Mr. Smith in my class on Statutory Interpretation. While I am biased, I believe that this class is among the most critical for preparing students to be good lawyers. As for future law clerks, I think the class is as essential as a course in Federal Courts or Administrative Law. Part of the reason the course is so essential, and so demanding, is that law students learn to read opinions as advocates as opposed to simply looking for the rule. Consistent with Mr. Smith's performance in Property Law, and all his other coursework, he excelled. Mr. Smith is skilled in disentangling the differing strands of argumentation—textualism, purposivism, intentionalism, legal process, and so on. He can describe the pros and cons of each, and most critically, he can combine and deploy them such that the result is a carefully crafted and internally consistent argument. Mr. Smith performed very well in the course and received an A-. Yet again, in Federal Indian Law—an extremely intellectually challenging course given the huge shifts in jurisprudence that regularly occur—Mr. Smith was fantastic and received an A-.

For context, for nearly ten years, I have been a tenured or tenure-track law faculty member and I have written dozens of recommendation letters for various accomplished students. Mr. Smith is among the top three students that I have ever taught in my career and is the ideal clerk for a judge. Let me tell you about the other two students, both of whom went on to clerk at federal district courts and then federal appellate courts.

During the academic year of 2013-2014, I was a tenure-track faculty member at Florida International University College of Law in Miam, Florida. I had the opportunity to teach two students, again in first-year Property, that excelled in that course. The gap in grade scores from those two students and the next highest student was, to be honest, massive. It was clear to me that they were well ahead of their peers and they needed to be at an institution which challenged them as students and future lawyers. After visiting with those students, they applied to the top law ten schools and received offers of admission from many of them. They accepted admission to a top five school, graduated, and went on to clerk for federal judges, then to BigLaw firms, and are now pursuing careers in legal academia. I mention them because I have a clear idea of what a top

student looks like. It is my firm belief that Mr. Smith will follow that same path of success and meaningfully contribute to our profession and your chambers.

Mr. Smith has come to law school with purpose. This is important. In my experience, some students end up in law school because they are not sure what else to do. This is not the case with Mr. Smith. The reasons why he's here propels his work ethic and commitment to the study of law. While many lawyers and law student are extrinsically motivated by grades, salary, or prestige, Mr. Smith is intrinsically motivated by his own intellectual curiosity and his commitment to shoring up and improving the judicial institutions of our State and Nation. This translates to his desire to seek a clerkship in your chambers—to best prepare himself so that he may contribute significance in the law throughout his career.

What sets certain intellectually gifted students apart from others is their excellence in non-academic areas. This, in truth, is why I feel so strongly about Mr. Smith. Beyond his academic prowess, he is a role model for younger law students and his peers. One critical factor in assessing a law student's fit or likely contributions to chambers is their reputation among their peers. This speaks to their own ability to get along well with others despite outside pressures and external stressors. Given how competitive and unhealthy law school culture can sometimes be, it is telling when a law student generates routine and regular praise from their law student peers. Mr. Smith is among the most well-liked and well-thought of students that I can recall. He is someone that is always spoken of in kind words—and from a variety of different types of law students. To be sure, this is in part why Mr. Smith holds the exact Board position that he does for the Black Law Students Association as the Alumni Engagement Coordinator.

Outside of his exceptional peer reputation, I have had the chance to come to know Mr. Smith quite well during his time at OU. He is professional, polite, while also retaining his humanity (and a sense of humor). I think all of these traits are important for being a successful and well-adjusted person for a life in the law—and especially in chambers. His reputation among faculty is similarly impressive—known as a hard worker and a committed student of the law. In my visits with Mr. Smith, I have learned that he is the first in his family to go to law school. This is often a challenge for those first-generation students in acclimating to and familiarizing themselves with the study of law. Mr. Smith has overcome that challenge with ease.

Of course, Mr. Smith entered law school in the midst of many challenges. In the Fall of 2020, during the pre-vaccine phase of the COVID-19pandemic, Mr. Smith began his legal career. At OU, some courses were held in-person only and others were held only via synchronous Zoom meetings. Mr. Smith's coursework included both formats—a challenge in and of itself. That time period was challenging for all of us across the nation and the globe. Despite those circumstances, and the inherent difficulty in making the transition to law school—let alone during a pandemic—Mr. Smith has demonstrated his resilience and anti-fragility at every single turn. Mr. Smith is more capable and impressive now than he was when he arrived. It is clear to me that he is the type of

person whose abilities improve through overcoming new hardships and rising to meet the challenge of the day. As Mr. Smith has graduated, I am extraordinarily proud to count him among my colleagues as lawyers. Students like Mr. Smith give me great hope that the next generation of lawyers will guide our communities towards justice, good governance, and healthier spaces. Mr. Smith will be a superb addition to your chambers—he is, candidly, a no-risk candidate for whom the sky is the limit. Without hesitation I recommend him for a place in your chambers.

If you have any questions, please contact me at your convenience.

Sincerely,

M. Alexander Pearl

WRITING SAMPLE

Mylon Smith
3913 24th Ave SE, Apt. 8
Norman, OK 73071
(405) 313-1811

This writing sample is an excerpt from a brief submitted for the 2021-2022 Southwest Black Law Students' Association's Thurgood Marshall Moot Court competition. My team represented the petitioner, the United States Government.

The overall brief received the Best Petitioner Brief award at the competition. Additionally, the overall brief received the Judge Wayne Alley Advocacy Award from the University of Oklahoma College of Law. The Judge Wayne Alley Advocacy award is awarded to one competition team whose brief is selected from all competition teams that have won brief awards at their respective Moot Court competitions. This excerpt is solely my work product and has not been edited by anyone else. The question that my part of the brief answered was:

1. Are inchoate offenses like attempt and conspiracy "controlled substance offenses" under § 4B1.1 of the United States Sentencing Guidelines for the purposes of career offender sentencing?

SUMMARY OF THE ARGUMENT

The district court properly sentenced the respondents as career offenders because their prior felony convictions for conspiracy were controlled substance offenses under § 4B1.1 of the United States Sentencing Guidelines. The Commentary's note to U.S.S.G. § 4B1.2(b) establishes that inchoate offenses like conspiracy can be considered controlled substance offenses. This Court has held that the Commentary's purpose is to interpret the Guidelines and should be followed unless doing so produces a result that is inconsistent with the Guidelines. There is no inconsistency between the Guidelines and the Commentary on the question presented before the Court. Therefore, the Commentary should be followed in respondents' sentencing.

ARGUMENTS AND AUTHORITIES

This Court reviews legal questions, including a lower court's application of the Sentencing Guidelines, de novo, and reviews factual findings for clear error. *United States v. Archuleta*, 865 F.3d 1280, 1285 (10th Cir. 2017) (citing *United States v. Craig*, 808 F.3d 1249, 1255 (10th Cir. 2015)).

I. RESPONDENTS JEFFRIES AND BROWN WERE PROPERLY SENTENCED AS CAREER OFFENDERS.

Jeffries and Brown were properly sentenced as career offenders because both respondents had prior felony convictions that triggered career offender sentencing. The Sentencing Guidelines provide that criminal defendants are considered career offenders if three elements are met:

1) The defendant was at least 18 years old at the time of the instant offense;

2) The instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and
3) The defendant has at least two prior felony convictions of either a crime of violence or controlled substance offense.

U.S.S.G. § 4B1.1.

It is undisputed that respondents were above the age of eighteen years old at the time of the instant offense. R. at 7. Additionally, it is undisputed that the instant offense both respondents were convicted of, robbery, is a felony that is a crime of violence. R. at 7.

However, it is disputed on whether the respondents have at least two prior felony convictions of the predicate offenses in § 4B1.1. The district court considered respondents' previous convictions for conspiracy to distribute controlled substances to be controlled substance offenses. The Fourteenth Circuit disagreed. The Fourteenth Circuit held that convictions for inchoate offenses like conspiracy do not qualify as prior felony convictions of controlled substance offenses. Thus, the Fourteenth Circuit reversed the district court's sentencing for respondents. This Court should reverse the Fourteenth Circuit's decision because (1) doing so is consistent with both the Sentencing Guidelines and the Commentary and (2) treating certain inchoate offenses as controlled substances offenses does not impermissibly expand the Guidelines' definition of Controlled Substances Offenses.

A. *There is no inconsistency between the Guidelines and the Commentary on Conspiracy qualifying as a Controlled Substance Offense.*

Controlled substance offenses are defined as offenses that violate "federal or state law prohibiting the manufacture, import, export, distribution, or dispensing of a controlled substance … or the possession of a controlled substance … with intent to manufacture, import, export, distribute, or dispense." § 4B1.2(b).

The Guidelines' definition for controlled substance offenses does not explicitly include inchoate offenses. But it does not explicitly exclude inchoate offenses from its definition either. The only guidance on whether inchoate offenses can qualify as controlled substance offenses comes from the Sentencing Commission, the agency authorized to promulgate the Commentary to the Guidelines. § 4B1.2(b) cmt. n.1. The Commentary provides that controlled substance offenses include "aiding and abetting, conspiring, and attempting to commit" offenses that are defined as controlled substance offenses in the Guidelines. § 4B1.2(b), cmt. n. 1. Therefore, inchoate offenses can be considered controlled substance offenses despite the Fourteenth Circuit's contradictory holding.

The circuit courts are not in unanimity on whether inchoate offenses like conspiracy can be controlled substance offenses despite their inclusion in the application note to § 4B1.2(b). A minority of circuit courts, the Sixth Circuit, D.C. Circuit, and now Fourteenth Circuit, have held that inchoate offenses cannot be controlled substance offenses. *United States v. Havis,* 927 F.3d 382, 387 (6th Cir. 2019); *United States v. Winstead,* 830 F.3d 1082, 1091 (D.C. Cir. 2018). However, most

of the circuit courts disagree and have held that inchoate offenses are indeed controlled substance offenses. *Winstead*, at 1091 (citing *United States v. Lange,* 862 F.3d 1290, 1294 (11th Cir. 2017); *United States v. Nieves-Borrero*, 856 F.3d 5, 9 (1st Cir. 2017); *United States v. Solomon*, 592 F. App'x 359, 361 (6th Cir. 2014); *United States v. Chavez*, 660 F.3d 1215, 1228 (10th Cir. 2011); *United States v. Mendoza-Figueroa*, 65 F.3d 691, 694 (8th Cir. 1995)).

The Fourteenth Circuit, Sixth Circuit, and D.C. Circuit based their holdings on a perceived inconsistency between the Commentary and the Guidelines. *United States v. Stinson*, 508 U.S. 36, 41 (1993), establishes that when there is an inconsistency between the Guidelines and the Commentary, the Guidelines supersede the Commentary. Because the Guidelines do not explicitly mention conspiracy in § 4B1.2(b), the Fourteenth Circuit held that following the Commentary would be inconsistent with the Guidelines and consequentially did not treat the respondents' prior felony convictions for conspiracy as controlled substance offenses. However, for this to be true, there must be an actual inconsistency between the Guidelines and the Commentary on this issue. Otherwise, the Fourteenth Circuit should have deferred to the Commentary.

Courts regularly defer to the "Commission's suggested interpretation of a guideline unless the Commission's position is arbitrary, unreasonable, inconsistent with the guideline's text, or contrary to law." *United States v. Fiore*, 983 F.2d 1, 2 (1st Cir. 1992), *United States v. Weston,* 960 F.2d 212, 219 (1st Cir. 1992), *United States v. Joshua*, 976 F.2d 844, 855 (3rd Cir. 1992), *United States v. Anderson*, 942 F.2d 606,

613-14 (9th Cir. 1991) (en banc), *United States v. Liranzo*, 944 F.2d 73, 78 (2nd Cir. 1991).

The Guidelines and Commentary are inconsistent only when "following one will result in violating the dictates of the other." *United States v. Piper,* 35 F.3d 611, 617 (1st Cir. 1994) (quoting *Stinson,* at 43). In *Piper,* the First Circuit held that there was no inconsistency between the Guidelines and the Commentary on whether inchoate offenses can qualify as controlled substance offenses. The court held so "because the application note … neither excludes any offenses expressly enumerated in the guideline, nor calls for the inclusion of any offenses that the guideline expressly excludes." *Id*. at 617.

Furthermore, the First Circuit recognized the inherent unreasonableness in separating conspiracy from the underlying offense in drug trafficking. *Piper,* 35 F.3d 611, 617 (1st Cir. 1994). The First Circuit held that drug-trafficking conspiracies are indeed controlled substance offenses because "the application note, when measured against the text of the career offender guideline, does not appear arbitrary or unreasonable." *Id*. at 617. The *Piper* court addressed the difficulty of separating drug-trafficking conspiracies from serious narcotic offenses as support for its decision. *Id*. The court noted that treating conspiracies as controlled substances offenses "is a logical step both from a lay person's coign of vantage and from the standpoint of the Commission's … oft-demonstrated preoccupation with punishing drug traffickers sternly." *Id*.

In *United States v. Crum*, 943 F.3d 963, 964 (9th Cir. 2019), the Ninth Circuit recognized that the Commentary and the Guidelines were consistent on the inclusion of inchoate offenses as controlled substance offenses. Citing *United States v. Vea-Gonzales*, 999 F.2d 1326 (9th Cir. 1993), the court recognized that inchoate offenses like conspiracy are "violations of law prohibiting the sale, manufacture, or distribution of controlled substances." *Id.* at 614.

The Seventh Circuit has also recognized that there is no conflict between the Guideline and the Commentary on inchoate offenses qualifying as controlled substance offenses. *United States v. Adams,* 934 F.3d 720, 729 (7th Cir. 2019). The court rejected the argument that conspiracy was not a controlled substance offense because "deciding how to handle conspiracy is a question about wise policy, not about textual conflict." *Id.*

Because of the lack of inconsistency between the Guidelines and the Commentary, the Fourteenth Circuit should have deferred to the Commentary's interpretation.

B. *Sentencing the Respondents as Career Offenders does not impermissibly expand the Guidelines' definition of Controlled Substance Offenses.*

Treating drug-trafficking conspiracies like the respondents' as controlled substance offenses does not impermissibly expand the Guidelines definition. Instead, it tracts with what the Guidelines has already designated as a controlled substance offense.

The Fourteenth Circuit relied on *United States v. Soto-Rivera*, 811 F.3d 53 (1st Cir. 2016) as an example of an impermissible expansion of the sentencing guidelines by a district court during sentencing. In *Soto-Rivera*, the defendant argued that he was improperly sentenced as a career offender because the district court treated his conviction for possession of a firearm as a felon as a crime of violence under § 4B1.1(a). *Id.* at 55. The First Circuit sided with the defendant because the defendant's prior felony conviction was only for a crime involving passive possession of a firearm which was distinguishable from a crime of violence. *Id.* at 62. Under the Guidelines, a crime of violence involves the actual, attempted, or threatened use of force and the defendant's conviction for passive possession of a firearm did not involve any of those elements. *Id.* Furthermore, neither the Guidelines nor Commentary suggested that passive possession of a firearm could be considered a crime of violence. *Id.* Therefore, the First Circuit properly decided that the defendant could not be sentenced as a career offender and remanded the defendant's case back to the district court. *Id.*

Respondents' sentencing as career offenders can be distinguished from the defendant's sentencing in *Soto-Rivera* for three reasons. First, *Soto-Rivera* addressed whether the defendant's prior felony conviction was for a crime of violence, not if it was for a controlled substance offense. Second, the crime of violence definition in the Guidelines and Commentary did not mention passive possession at all, but the Commentary's note for § 4B1.2(b) explicitly provides that inchoate offenses conspiracy can be considered controlled substance offenses. Finally, unlike passive possession of a firearm which does not involve actual, threatened, or attempted use

of force, respondents' drug-trafficking conspiracy convictions involve violations of federal law prohibiting the distribution of controlled substances. Therefore, the Fourteenth Circuit's reliance on *Soto-Rivera* was misplaced.

Conspiracies with the object of committing a controlled substance offense defined in § 4B1.2(b) are controlled substance offenses. *United States v. Lewis,* 963 F.3d 16, 22 (1st Cir. 2020). The *Lewis* court held that if a controlled substance offense is the object of the conspiracy, it is sufficient to trigger career offender sentencing. *Id.* at 22.

The object of both respondents' conspiracy convictions was distribution of a controlled substance. Distribution falls within the ambit of the definition of controlled substance offense as defined in U.S.S.G. § 4B1.2(b). Therefore, because the object of respondents' conspiracy conviction was to commit a controlled substance offense, career offender sentencing was proper.

Applicant Details

First Name	**Anna**
Middle Initial	**A**
Last Name	**Sonju**
Citizenship Status	**U. S. Citizen**
Email Address	**bnd2tt@virginia.edu**
Address	**Address** Street **312 Alderman Road** City **Charlottesville** State/Territory **Virginia** Zip **22903** Country **United States**
Contact Phone Number	**3035893103**

Applicant Education

BA/BS From	**Vanderbilt University**
Date of BA/BS	**May 2020**
JD/LLB From	**University of Virginia School of Law** **http://www.law.virginia.edu**
Date of JD/LLB	**May 12, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Virginia Environmental Law Journal** **Virginia Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Law, David
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(434) 924-7675
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Schwartzman, Micah
schwartzman@law.virginia.edu
434-924-7848

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Anna A. Sonju

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June 12, 2023

The Honorable Jamar K. Walker
U.S. District Court, E.D. Va.
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a rising third-year student at the University of Virginia School of Law, and I am writing to apply for a clerkship in your chambers following my graduation in May 2024.

I am particularly interested in living in Norfolk due to my ties to Virginia, where I attend law school and my long-term partner resides.

I am enclosing my resume, my law school transcript, and a writing sample. You will also be receiving letters of recommendation from Professors Micah Schwartzman, Cale Jaffe, and David Law. If you would like to reach them, Professor Schwartzman's telephone number is (434) 924-7848, Professor Jaffe's telephone number is (434) 924-4776, and Professor Law's telephone number is (434) 924-7675.

Please feel free to reach out to me if I can provide any additional information. Thank you for your consideration.

Sincerely,

Anna Sonju

Anna A. Sonju

312 Alderman Road, Charlottesville, VA 22903 • (303) 589-3103 • bnd2tt@virginia.edu

EDUCATION

University of Virginia School of Law, Charlottesville, VA
Juris Doctor, Expected May 2024

- *Virginia Law Review*, Editorial Board
    - Student Note selected for publication (forthcoming April 2024)
- *Virginia Environmental Law Journal*, Projects Director
- Environmental Law and Community Engagement Clinic
    - Drafted *amicus* brief and journal article submission (pending)
- Merit Scholarship

Vanderbilt University, Nashville, TN
Bachelor of Arts, Molecular and Cellular Biology (Minors: Chemistry, Spanish), May 2020

- Recipient of Nichols' Humanitarian Fund Award (volunteered as a researcher with the Maldives Whale Shark Research Programme)
- Swingin' Dores A Cappella, Musical Director and Vice President

EXPERIENCE

Winston & Strawn LLP, Chicago, IL
Summer Associate, May 2023 – present

- Research and draft memoranda regarding patent and complex commercial litigation

Professor David Law, University of Virginia School of Law, Charlottesville, VA
Research Assistant, November 2022 – present

- Research history and development of Asian values and constitutional law in Asia
- Edit, cite check, and proofread draft for forthcoming book chapter

Bradley Arant Boult Cummings LLP, Nashville, TN
Summer Associate, May 2022 – July 2022

- Researched and drafted memoranda regarding trademark infringement, regulatory compliance, and class action litigation
- Drafted patent office action response strategy and complaint

Glenmoor Country Club, Cherry Hills Village, CO
Tennis Professional, May 2021 – August 2021

- Provided tennis lessons and match coaching to youth tennis players

Vail Resorts, Breckenridge, CO
Alpine Ski Professional, November 2020 – May 2021

- Provided ski lessons to novice and intermediate skiers in English and Spanish

Vanderbilt University Medical Center, Nashville, TN
Research Assistant, January 2018 – April 2019

- Performed medical research studying mitochondrial cardiac function under oxidative stress
- Drafted scientific report presented at 2019 Experimental Biology Conference

PERSONAL

Languages: Spanish (professional working), Japanese (elementary)

Interests: Racquet sports, NBA basketball, chess, baking, hiking

UNIVERSITY OF VIRGINIA
SCHOOL OF LAW

Name: Anna Sonju

Date: June 06, 2023
Record ID: bnd2tt

This is a report of law and selected non-law course work (including credits earned). This is not an official transcript.

Due to the global COVID-19 pandemic, the Law faculty imposed mandatory Credit/No Credit grading for all graded classes completed after March 18 in the spring 2020 term.

		FALL 2021			
LAW	6000	Civil Procedure	4	B+	Woolhandler,Nettie A
LAW	6002	Contracts	4	B+	Nachbar,Thomas B
LAW	6003	Criminal Law	3	B+	Bonnie,Richard J
LAW	6004	Legal Research and Writing I	1	S	Buck,Donna Ruth
LAW	6007	Torts	4	B+	Abraham,Kenneth S
		SPRING 2022			
LAW	7788	Science and the Courts (SC)	1	A-	Rakoff,Jed S
		SPRING 2022			
LAW	6001	Constitutional Law	4	B	Mahoney,Julia D
LAW	7023	Emply Law: Contrcts/Torts/Stat	3	B+	Verkerke,J H
LAW	6104	Evidence	4	B+	Mitchell,Paul Gregory
LAW	6005	Lgl Research & Writing II (YR)	2	S	Buck,Donna Ruth
LAW	6006	Property	4	B+	Schragger,Richard C.
		FALL 2022			
LAW	6102	Administrative Law	4	B+	Duffy,John F
LAW	9077	Asian Amer and the Law	2	B+	Law,David S.
LAW	7017	Con Law II: Religious Liberty	3	A	Schwartzman,Micah Jacob
LAW	7009	Criminal Procedure Survey	4	B+	Harmon,Rachel A
LAW	9327	Law & Social Science Colloqium	1	B+	Mitchell,Paul Gregory
		SPRING 2023			
LAW	7692	Persuasion (SC)	1	B+	Shadel,Molly Bishop
		SPRING 2023			
LAW	8003	Civil Rights Litigation	3	B+	Frampton,Thomas Ward
LAW	7103	Education Law Survey	3	A	Robinson,Kimberly Jenkins
LAW	8640	Enviro and Comm Eng Clinic	4	B+	Jaffe,Caleb Adam
LAW	6112	Environmental Law	3	B+	Livermore,Michael A.
LAW	7612	Genetics: Exerc Rule-Mkg (SC)	1	B+	Siegal,Gil

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am pleased to recommend Anna Sonju for a clerkship in your chambers. Anna was a student in my Asian Americans and the Law class in fall 2022, and I subsequently recruited her to serve as my research assistant. She has a particular interest in the intersection of law and science (e.g., IP; environmental law), which makes sense in light of her hard-science training: she studied molecular and cellular biology (with a minor in chemistry) at Vanderbilt before attending UVA Law. Post-graduation, she will be joining a patent litigation group, and she is particularly interested in clerkships with an IP / environmental law angle.

Her research work for me has consisted of a combination of substantive research (spanning both law and political science), editing, proofreading, and cite-checking. As my research assistant over the last couple of months, she has required very little instruction or supervision and has been capable, reliable, careful, and very easy to work with. For her first assignment (survey the scholarly empirical literature on the supposed phenomenon of Asian values), she came up with a thoughtful selection of materials that were on point and showed good judgment; she neither deluged me with materials of mixed quality nor delivered tangential or irrelevant materials. The subsequent proofreading/citechecking assignment went smoothly and on time and was of high quality. A lot of research assistants, especially in their initial outings, will go overboard by correcting things that aren't really errors, with the result that I have to roll back the overediting. Again, Anna showed good judgment and restraint. In terms of personality, she is relaxed, direct, and uncomplaining and has no difficulty accepting instructions or critical feedback. She comes across as being very mature and able to get along with a wide variety of people, which I suspect reflects a degree of worldliness from having lived in four or five different countries and having a cross-cultural family background.

Her raw academic performance thus far has been middle of the road by UVA standards, but with flashes of excellence in areas of particular interest (Judge Rakoff's Science and the Law course; Prof. Schwartzman's advanced con law course). As there were only 11 students in my Asian Americans and the Law class, most people (including Anna) received the mandatory mean of B+. Most of the final papers received average grades because they were competently written and did a good job of synthesizing and applying course materials but did not develop original arguments that went beyond the course materials; Anna's paper was typical in these regards. In terms of class participation, she was (like many students here at UVA) on the quiet and thoughtful side: she did not volunteer frequently, but she showed good preparation and spoke thoughtfully and in a measured way whenever she did volunteer or was called on.

Anna is very well suited to a judicial clerkship. In terms of raw intellect, she has no trouble keeping up, but just as importantly, she is a responsible and conscientious worker who can figure out what she is supposed to do with minimal instruction and gets along well with just about everyone, as far as I can tell. She would be an especially great pickup for any chambers interested in a law clerk with a science background who is a team player and especially well suited by both training and interest to handle IP and law and science matters. I recommend her without reservation.

Best,

David S. Law

David Law - davidlaw@law.virginia.edu - (434) 924-7675

Cale Jaffe
University of Virginia School of Law
580 Massie Road
Charlottesville, VA 22903

June 10, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to offer an extremely enthusiastic and heartful recommendation for Anna Sonju, who has applied for a clerkship in your chambers. I came to know Anna as a student in the Environmental Law and Community Engagement Clinic for the Spring 2023 semester. Enrollment in the Clinic is managed through a competitive application process. Once admitted, students must make a significant commitment to working on Clinic cases—13 hours per week, on average, over the course of the semester.

Because of this structure, the Clinic gives me a unique opportunity to assess students in a real-world, office-like environment. In this environment, Anna has excelled. Through our one-on-one check-ins to go over her writing and through her outstanding participation in the seminar portion of the Clinic (where we workshopped drafts of briefs and discussed case strategy), I have come to know Anna as an astounding student-lawyer.

The Law School imposes a strict curve on graded classes, including clinics. This past semester, I had only two other students enrolled with Anna in the Spring Clinic, making it impossible to recognize her achievements with a grade. To give her an A or A- would have required giving another student a below-mean B or lower—and no student this Spring merited a low grade. Rest assured; I have no hesitation about the quality of Anna's excellent work. Without the imposition of a curve, she would have earned an A. (Next academic year, I am switching to an Honors/Pass/Fail grading system to avoid the dilemma I faced with letter grades this Spring.)

After observing Anna's work closely over the last semester, I can confidently say she will make a top-notch lawyer and is one of the first people I would want to hire to join a legal team. She is exceptionally bright and hard-working. She volunteered for some of the "grunt" work that no student wants—e.g., reviewing and editing the transcripts of client interviews for potential use in legal filings. At the same time, she flourished on some of the more challenging, intellectual work like researching and drafting an amicus brief to the Virginia Court of Appeals.

Indeed, her work on the amicus brief was remarkable. The case, Layla H. et al. v. Commonwealth, considered complex and novel claims alleging a substantive due process right to a healthy environment. Our amicus client in the case was Virginia Clinicians for Climate Action, an organization of medical professionals concerned about climate change and the worsening health impacts of increasing greenhouse gas pollution.

Drafting a brief from the perspective of medical clinicians was challenging, as it required students to synthesize medical-journal research on the Social Determinants of Public Health with state constitutional legal questions. Given Anna's impressive background (majoring in Molecular and Cellular Biology and minoring in Chemistry at Vanderbilt), she was a natural fit for this project. She took the lead for the Clinic in digesting the medical literature and translated it into language that would resonate with a layperson audience.

What was most impressive about Anna's work on the brief, however, was the collaborative spirit that she brought to the assignment. I preach to students that there can be "no pride in authorship" when it comes to legal writing. We work as a team and we need to be relentless in jettisoning weaker arguments and refining stronger ones. No other student I have taught has ever been as committed to this idea. Anna always put the quality of the brief first without worrying about whether she received any credit for it.

But make no mistake, Anna deserves credit for the impressive quality of her writing. The Virginia Law Review selected her excellent student note—on First Amendment, free-exercise claims over indigenous sacred sites—for publication. It is a testament to Anna's strength as a writer and thinker. As with the amicus brief, Anna synchronized two, disparate areas of research---constitutional law and the sociology of indigenous religions—to produce one of the strongest student Notes I have read.

I should add that Anna was a stellar contributor during the seminar portion of our Clinic, when we would discuss all of the students' projects in addition to debating supplemental readings that I would assign. She was a steady contributor and respectful listener during these sessions. Anna is kind, gracious, thoughtful, and generous to her colleagues. She is a joy to be around. Because of these traits, I have no doubt she would be an excellent addition to any judicial chamber. I would absolutely hire Anna in a minute.

Sincerely,

Cale Jaffe

Caleb Jaffe - cjaffe@law.virginia.edu - (434) 924-4776

Professor of Law, General Faculty
Director of the Environmental Law & Community Engagement Clinic

Caleb Jaffe - cjaffe@law.virginia.edu - (434) 924-4776

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing on behalf of Anna Sonju, who has applied for a clerkship in your chambers. I have chaired the faculty clerkships committee at Virginia for nearly fifteen years. In that capacity, I have worked hundreds of students who have placed in federal and state clerkships, and I am confident that Anna is going to make an excellent clerk. She has intellectual range, with training in the sciences, strong analytical ability, and skill in legal writing. Those virtues, along with her demonstrated work ethic, lead me to recommend her to you with great enthusiasm.

Anna wrote a terrific paper for me in Constitutional Law II: Religious Liberty. In the fall of 2022, I had 72 students, including most of the top-25 in the second-year class. I allow a paper option instead of a traditional exam, and 20 students chose to exercise it. Many of them submitted their papers to the Virginia Law Review for publication. This year, only Anna's was selected. Over the last several years, the Notes editors of the Law Review have seen dozens of papers from students in my class, and the bar has risen on successfully placing a paper on any topic having to do with religious liberty. That Anna managed to get hers through the process is no small achievement.

Anna's paper, entitled Free Exercise Claims Over Indigenous Sacred Sites: Justice Long Overdue, focuses on the aftermath of Lyng v. Northwest Indian Cemetery Protection Association, 485 U.S. 439 (1988), in which the Supreme Court rejected a free exercise challenge brought by Native American groups seeking to protect sacred lands on federal property. Against the Court's restrictive understanding of what counts as a "substantial burden" under the Free Exercise Clause, Anna proposes a modified coercion test that accounts for the significance of indigenous sacred lands, but without allowing endless and anarchic challenges to internal government decisions. Threading that needle has been difficult in free exercise jurisprudence, and with pending litigation in Apache Stronghold v. United States, there is considerable interest in resolving the problem. Anna's solution might well find an audience, especially if the Supreme Court decides to revisit this issue, which seems very possible.

Anna's performance in my class is a highlight for her at UVA. She obviously excels in legal research and writing. Her paper is a clear example of sustained and superb academic work. Given her background in biology and chemistry (and without any lawyers in her family), I suspect she had to make more of an adjustment coming to law school. For that reason, I think that her grades understate her intellectual abilities. I would expect that her grades will continue to improve through graduation, especially in courses that emphasize extensive writing. Anna has taken a difficult course load, in subjects far from her undergraduate studies. I give her credit for branching out and for taking on these challengers. She is going to be a better lawyer and a stronger writer for doing it.

On a personal note, I have greatly enjoyed getting to know Anna. She obviously has a passion for environmental law. I am sure that growing up out west, in Colorado, has shaped her interests, both in environmental issues and in overlapping concerns about Native American lands. Whether Anna pursues these interests or decides to build on her science background, perhaps through patent law, I am confident that she will bring great energy and determination to her work. I also know that she will be a team player, who is open-minded, friendly, and empathetic. She is going to get along well with anyone in chambers, and I have to think her co-clerks will enjoy her trust and friendship.

Based on her academic work, her writing ability, and her intellectual breadth and determination, I am confident that Anna will be an excellent clerk. I hope you give her careful consideration.

If you have any questions, please feel free to reach me at 434-924-7848.

Sincerely,

/s/

Micah J. Schwartzman
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Roy L. and Rosamond Woodruff Morgan
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Anna A. Sonju

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The attached writing sample is a Student Note I wrote, which is derived from my final paper for Constitutional Law II: Religious Liberty with Professor Micah Schwartzman. In this excerpt, I analyze and argue for a change in the Supreme Court's free exercise jurisprudence as it pertains to Indigenous sacred sites. The full Note is available upon request. This writing sample is entirely my own work product.

FREE EXERCISE CLAIMS OVER INDIGENOUS SACRED SITES: JUSTICE LONG OVERDUE

Free exercise claims seeking protection of Native American sacred sites have seldom succeeded following the Supreme Court's ruling in *Lyng v. Northwest Indian Cemetery Protective Association*.[1] In *Lyng*, Native American tribes brought a claim that the government's designation of a construction project for a sacred site violated their free exercise rights guaranteed by the First Amendment.[2] The majority struck down this challenge, rejecting the claimants' argument that the government imposed a substantial burden on their free exercise rights since they were not "coerced by the Government's action into violating their religious beliefs."[3]

Since *Lyng*, courts have repeatedly struck down free exercise claims involving Native American sacred sites,[4] reaffirming the notion that the government has imposed a substantial burden on a Native American party's free exercise rights concerning a sacred site *only* when its action amounts to an affirmative act of coercion under threat of sanctions.[5] Although Congress subsequently passed multiple laws aimed at protecting religious freedom,[6] including one directed specifically at Native American religious liberty,[7] these statutes have also failed to create a judicially enforceable cause of action.[8]

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[1] 485 U.S. 439 (1988).
[2] *Id.* at 443.
[3] *Id.* at 449.
[4] *See, e.g.*, Navajo Nation v. United States Forest Serv., 535 F.3d 1058 (9th Cir. 2008); Apache Stronghold v. United States, 38 F.4th 742, 759 (9th Cir. 2022); Badoni v. Higginson, 638 F.2d 172, 177 (10th Cir. 1980); Slockish v. United States Fed. Highway Admin., No. 08-CV-01169, 2018 WL 2875896 (D. Or. June 11, 2018).
[5] Navajo Nation v. United States Forest Serv., 535 F.3d 1058, 1070 (9th Cir. 2008) (holding that the government had not imposed a substantial burden on Plaintiffs because it did not "coerce the Plaintiffs to act contrary to their religion under the threat of civil or criminal sanctions.").
[6] *See* Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et. seq*; Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et. seq*.
[7] *See* American Indian Religious Freedom Act, 42 U.S.C. § 1996.
[8] *See Lyng*, 485 U.S. at 455 ("[AIRFA does] not 'confer special rights on Indians,' [does] 'not change any existing State or Federal law,' and in fact 'has no teeth in it.'") (quoting 124 Cong. Rec. 21444 (1978)). *See also* Wilson v.

This Note argues that the *Lyng* Court's narrow interpretation of the substantial burden test necessarily precludes the success of Native American free exercise claims involving sacred sites. In response, this Note introduces an alternative meaning of coercion within the Court's substantial burden framework, which would afford sacred site claims a realistic possibility of passing muster. Part I provides a history and background of free exercise jurisprudence and legislation surrounding Native American sacred sites. It presents an overview of the substantial burden test established originally in *Sherbert v. Verner*[9] *and Wisconsin v. Yoder*[10] and adopted in *Lyng* and its progeny, followed by an analysis of failed statutory attempts to protect Native American religious liberty. Lastly, Part I highlights why *Lyng* fails to protect free exercise rights and demands a reformulation of sacred site claims within the contours of the *Sherbert/Yoder* test.

I. The Road from *Sherbert/Yoder* to Now

Part I argues for the necessity of a modified substantial burden test in the context of Native American sacred sites. Part A provides background on free exercise jurisprudence leading up to and including the Supreme Court's *Lyng* decision. Part B overviews Congress's codification of free exercise rights and explains why these statutes have failed to effectively protect Native American religions in practice. Part C concludes by urging the Court to modify its standard of review for sacred site free exercise claims by broadening its preexisting framework.

A. Strict Scrutiny Under *Sherbert/Yoder/Lyng* and its Implications for Sacred Sites

The Supreme Court's decision in *Lyng* arrived amid a line of cases epitomizing the Court's unwillingness to seriously entertain most free exercise claims. First, in *Sherbert* the

Block, 708 F.2d 735 (D.C. Cir. 1983) ("AIRFA requires federal agencies to consider, but not necessarily to defer to, Indian religious values.").

[9] 374 U.S. 398 (1963).

[10] 406 U.S. 205 (1972).

Court established a strict scrutiny test for free exercise claims.[11] This required plaintiffs alleging a free exercise violation to initially demonstrate that the government has imposed a burden on the free exercise of their religion.[12] Upon such a showing, the government needed to prove that its infringement of a plaintiff's free exercise rights was "justified by a 'compelling state interest,'"[13] otherwise the free exercise challenge would prevail. In *Yoder,* the Court finetuned its definition of "burden," clarifying that the government action at issue must "*unduly* burden[] the free exercise of religion."[14] The Court applied this standard stringently in future cases: with the exception of *Yoder*, the Court upheld only those free exercise challenges with facts closely reminiscent to *Sherbert.*[15]

A few years after *Yoder,* the Court in *Lyng* endorsed a fatally narrow meaning of burden which implicitly prevented any sacred site free exercise claim thereafter from succeeding. *Lyng* involved a challenge to a federal timber and road construction project set to occur on sacred lands historically used for Native American religious rituals.[16] Justice O'Connor, writing for the majority, rejected the plaintiffs' claim that their free exercise rights had been violated.[17] In so doing, she concluded that the government has only unduly burdened one's religion if it "coerce[s] individuals into acting contrary to their religious beliefs" or "penalize[s] the exercise of religious rights by denying religious adherents an equal share of the rights, benefits, and

[11] *Sherbert*, 374 U.S. 398 (1963).
[12] *Id.* at 403.
[13] *Id.* (quoting Nat'l Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 438 (1963)).
[14] *Yoder*, 406 U.S. at 220 (emphasis added).
[15] James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment,* 78 VA. L. REV. 1407, 1414 (1992) ("[S]ince establishing the test in *Sherbert v. Verner* in 1963, the Court rejected thirteen of the seventeen free exercise claims it heard. Moreover, three of the four victories involved unemployment compensation and thus were governed by the explicit precedent of *Sherbert*. . . . [E]ven the holding in *Yoder,* exempting Amish children from compulsory school attendance laws, seems limited to the facts of that case and the adherents of the Amish order."). To view the three unemployment successful compensation cases, see Frazee v. Ill. Dep't of Emp. Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707 (1981).
[16] Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 439 (1988).
[17] *Id.*

privileges enjoyed by other citizens."[18] According to Justice O'Connor, the plaintiffs in *Lyng* failed to satisfy the above test because (1) a government action is not coercive if it merely interferes incidentally with a claimant's religious practices without a threat of penalties, and (2) the plaintiffs were not denied rights, benefits, and privileges enjoyed by other citizens.[19]

In her majority opinion, Justice O'Connor did not dispute that the government project at issue in *Lyng* could have potentially "devastating effects on traditional Indian religious practices."[20] Nevertheless, she maintained that even if the government action would wholly *destroy* the Native Americans' ability to practice their religion, their claim would still fail because holding otherwise would require the government "to satisfy every citizen's religious needs and desires."[21] In her view, if a government action did not actively *prohibit*[22] free exercise of religion with threat of penalties, individuals were not entitled to "a veto over public programs,"[23] such as government projects on sacred sites. This formulation of *the Sherbert/Yoder* test created an impossible hurdle for Native Americans: it gave the government free reign to pursue practically any project on a sacred site without being considered coercive under the Free Exercise Clause, as long as it did not explicitly ban Native Americans' access to those sites.

The Court's impossibly high standard moreover minimized the government's responsibility to mitigate the detrimental effects of its projects on sacred sites in two principal

[18] *Id.* at 440.
[19] *Id.* The second substantial burden factor is inapplicable to this Note because it is relevant only when a plaintiff has been denied explicit benefits conferred by the government, such as unemployment benefits. *See, e.g.*, Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707 (1981) (involving denial of unemployment benefits to a religious applicant); Sherbert v. Verner, 374 U.S. 398 (1963) (concerning denial of unemployment benefits to a religious claimant who refused to work during the Sabbath).
[20] *Id.* at 451.
[21] *Id.* at 452.
[22] *Id.* at 453 ("A law prohibiting the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions."
[23] *Id.* at 452.

ways.[24] First, the *Lyng* majority dismissed the American Indian Religious Freedom Act (AIRFA)[25]—a statute enacted to protect and preserve Native Americans' religious freedoms and access to sacred sites—as creating no judicially enforceable right.[26] Thus, this once-promising statute is now little more than a policy aspiration, conferring no legal responsibility on the government to prioritize Native American religious rights. Second, since the standard is exceptionally demanding of plaintiffs, the onus rarely shifts to the government to demonstrate its compelling interest and use of the least restrictive means in pursuing that interest.[27] Therefore, in practice the government never actually needs to have a compelling interest to prevail under *Lyng*.[28] It can instead rely on the fact that judicial review will terminate before it ever carries the evidentiary burden. After *Lyng*, we are accordingly left with scant legal protection of sacred sites, and few incentives for the government to avoid them.

B. Rational Basis Under *Smith* and Statutory Responses

Just two years after *Lyng*, in *Employment Division v. Smith*[29] the Supreme Court disallowed religious exemptions from compliance with neutral and generally applicable laws, abandoning the substantial burden test entirely and opting for rational basis review. This drastic

[24] Justice O'Connor did mention all the mitigation steps the government took in the construction project at issue in *Lyng*. *Id.* at 454 ("It is worth emphasizing, therefore, that the Government has taken numerous steps in this very case to minimize the impact that construction of the G–O road will have on the Indians' religious activities."). However, nothing in this portion of the opinion confers legal responsibility on the government since the Court never reached the government interest prong of the substantial burden test.
[25] The American Indian Religious Freedom Act (AIRFA) asserts that "it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites." American Indian Religious Freedom Act, 42 U.S.C. § 1996.
[26] *Lyng*, 485 U.S. at 455 (explaining that the Act's legislative history suggests that it does not give Native Americans special religious rights).
[27] Ryan, *supra* note 15, at 1416. ("[Prior to *Smith*], to show a burden was often to present simultaneously the government's compelling interest. Conversely, if the government's involvement or interference was not strong, i.e., its interest was not compelling, it was unlikely that a burden could be demonstrated.").
[28] See *Lyng*, 485 U.S. at 473 (Brennan, J., dissenting) ("[T]he Court has effectively bestowed on one party to this conflict the unilateral authority to resolve all future disputes in its favor.").
[29] 494 U.S. 872 (1990).

swerve in doctrine was met by the public with "condemnation and despair,"[30] which swiftly led to a legislative resolution: the Religious Freedom Restoration Act of 1990 (RFRA).[31] RFRA essentially reinstated the strict scrutiny language devised in *Sherbert/Yoder*, formally establishing the "substantial burden" test for free exercise claims. Then, in *City of Boerne v. Flores*,[32] the Court held unconstitutional portions of RFRA that applied to state and local government actions. Congress, however, responded swiftly by enacting the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)[33] as an extension of RFRA, which applied heightened judicial review to state and local government actions restricting religious exercise in the land use and prison contexts.

While there are competing theories on the relevance of pre-*Smith* free exercise cases as authority after RFRA's enactment,[34] the Court has since overall interpreted RFRA as providing "very broad protection for religious liberty."[35] It has not, however, specifically addressed the persuasiveness of *Lyng* in sacred site claims after RFRA. Nevertheless, neither RFRA nor RLUIPA have offered any extra protection for Native American sacred sites in lower courts. Even after RFRA's enactment and the Supreme Court's broad interpretation of the text, lower courts have consistently relied on *Lyng* as binding authority in evaluating Native American free exercise claims.[36] For example, in *Navajo Nation v. United States Forest Service*,[37] the Ninth

[30] Ryan, *supra* note 15, at 1409.
[31] Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et. seq*.
[32] 521 U.S. 507 (1997).
[33] Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc *et. seq*.
[34] *See* Micah J. Schwartzman, *What Did RFRA Restore?*, RELIGIOUS FREEDOM INSTITUTE (Sept. 11, 2014), https://religiousfreedominstitute.org/2016-6-30-what-did-rfra-restore/.
[35] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 685 (2014).
[36] *See, e.g.*, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 239 F. Supp. 3d 77, 93 (D.D.C. 2017) ("That *Lyng* was a Free Exercise, rather than a RFRA, case does not change its applicability here. . . . In enacting RFRA, Congress restored the compelling-interest test set forth in pre-Smith cases."); Real Alts., Inc. v. Sec'y Dep't of Health & Hum. Servs., 867 F.3d 338, 363 (3d Cir. 2017) ("[I]n passing RFRA, Congress bolstered Lyng's reading of the Free Exercise Clause with RFRA's text and legislative history.").
[37] 535 F.3d 1058 (9th Cir. 2008).

Circuit rejected a challenge to the federal government's use of a sacred mountain for creating artificial snow for skiing. In its reasoning the court affirmed the exact burden test in *Lyng*, finding that it was "consistent with the *Sherbert* standard codified in RFRA."[38] RLUIPA's protection of land has also proven entirely futile in the sacred site context—appellate courts have only applied RLUIPA to government land-use regulations of private land, and sacred sites are generally on public land.[39]

C. The Need for Change in Free Exercise Doctrine

The evolution of free exercise jurisprudence has highlighted the need for a fundamental reconceptualization of the doctrine. The test set forth in *Lyng* is functionally rational basis wearing a strict scrutiny disguise,[40] and it is fatal in fact for sacred site claims. Despite how indispensable sacred sites are for the meaningful practice of Native American religions, courts erroneously focus not on maintaining the existence of the sites themselves, but rather, *access* to them. They care not about the government's destruction of sacred sites, but whether it has physically prohibited religious claimants from accessing them. This perspective is utterly flawed—access to a sacred site does not protect free exercise rights if the site's religious value has been decimated. Sacred sites are a physical manifestation of spiritual beings, and in order to protect Native American religions, they must be acknowledged as such.

A change in doctrine is moreover necessary because *Lyng* and its progeny fail to capture the spirit of the Free Exercise Clause generally.[41] James Madison, in his pursuit of religious

[38] *Id.* at 1073.
[39] *Id.* at 1077. *See also* Apache Stronghold v. United States, 38 F.4th 742, 759 (9th Cir. 2022) (holding that RLUIPA only applies to private land).
[40] *See* Ryan, *supra* note 15, at 1416 ("*Smith* in one sense achieved wholesale what the Court had already been doing retail.")
[41] *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 477 (1988) (Brennan, J., dissenting) ("The safeguarding of such a hollow freedom not only makes a mockery of the 'policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the[ir] traditional religions . . . . it fails utterly to accord with the dictates of the First Amendment.").

liberty, emphasized that people deserve "*equal* title to the free exercise of [r]eligion according to the dictates of [c]onscience."[42] *Lyng* plainly fails to fulfill this purpose. To clarify, placing the onus on Native Americans to demonstrate a substantial burden does not itself deprive them of equal title to free exercise. Indeed, the standard of scrutiny is high for all religious claimants, and the Court has denied most claims for religious exemptions since *Sherbert*, regardless of their religion.[43] However, unlike with sacred sites, the Court has willingly granted exemptions to individuals coerced into specific *acts* contrary to their religious principles.[44] On the other hand, the Court's treatment of Native American *land* has proven to demand a completely different level of scrutiny. That is, unless the government explicitly bans access to a sacred site, which it will almost never do, it is simply impossible for Native American claimants to meet their evidentiary burden. Thus, the Court's unique hostility to sacred site claims can hardly be seen as granting Native Americans equal title to free exercise rights.

The Court in *Lyng* justifiably cited concern that veering away from the substantial burden test could potentially open the floodgates to endless litigation, tasking courts with "reconcil[ing] the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours."[45] This objection would surely be reasonable if the Court was asked to lower the plaintiff's burden generally for *all* government actions, as Justice O'Connor implied would happen if the Court strayed from the test.[46] However, if the Court narrowly modifies the substantial burden inquiry for claims *only* rooted in the niche

[42] JAMES MADISON, MEMORIAL AND REMONSTRANCE ¶15 (1819).
[43] *See* Ryan, *supra* note 15, at 1414 ("[T]he Court rejected thirteen of the seventeen free exercise claims it heard.").
[44] *See, e.g.*, *Hobby Lobby*, 573 U.S. 682 (2014); Holt v. Hobbs, 574 U.S. 352 (2015); Thomas v. Rev. Bd. of Ind. Emp. Sec. Div., 450 U.S. 707 (1981).
[45] *Lyng*, 485 U.S. at 452.
[46] *Id.* (expressing concern that challenges will be brought to "a broad range of government activities—social welfare programs to foreign aid to conservation projects.").

context of access to sacred sites or analogous types of land, such a change will not give citizens a broad veto on an array of government actions.

In sum, *Lyng* destroyed the viability of essentially all sacred site free exercise claims by establishing a hurdle that Native American claimants can never overcome. Further, the judiciary and legislature have since failed to address this problem. Such treatment of sacred sites reflects a fundamental misunderstanding of Native American religions, and simply runs counter to the purpose of the Free Exercise Clause and the values of the Founding Fathers. If courts are to ever ensure equal free exercise rights to all religious claimants, the Supreme Court must expand its conception of substantial burden to level the playing field for sacred site claims.

Applicant Details

First Name	**Benjamin**
Last Name	**Spencer**
Citizenship Status	**U. S. Citizen**
Email Address	**benjamin.spencer@duke.edu**
Address	**Address** **Street** **4225 Larchmont Road, Apt. 1127** **City** **Durham** **State/Territory** **North Carolina** **Zip** **27707** **Country** **United States**
Contact Phone Number	**(864) 492-2601**

Applicant Education

BA/BS From	**University of South Carolina-Columbia**
Date of BA/BS	**May 2021**
JD/LLB From	**Duke University School of Law** **https://law.duke.edu/career/**
Date of JD/LLB	**May 1, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Duke Environmental Law and Policy Forum** **Duke Law and Technology Review** **Duke Journal of Constitutional Law and Public Policy**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Waitzkin, Michael
michael.waitzkin@duke.edu
2025281684
Benjamin, Stuart M.
Benjamin@law.duke.edu
(919) 613-7275
Raskin, Sarah
sarah.raskin@duke.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Benjamin A. Spencer
4225 Larchmont Road
Apt. 1127
Durham, NC 27707

June 12, 2023

The Honorable Jamar K. Walker
United States District Court for the
Eastern District of Virginia
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I am writing to express my sincere interest in clerking for you, beginning any time after my graduation from Duke Law School in May of 2024. I can think of no more honorable way to begin my career than working for and learning from both you and the entire Eastern District of Virginia. As a native South Carolinian who has fond memories of growing up during hot and humid summers, I have always hoped to build a life and a career in the southeast.

Since my first time interning for a state judge during college, I have been fascinated by the dual nature of the judiciary—resolving past and present disputes, while being mindful of the future impact of the court's words, arguments, and actions. In my time at Duke, I have continued to explore this relationship through my multifaceted work on three different journals, allowing me the opportunity to collaborate with other students while researching and writing on constitutional law, environmental law, education policy, transactional disputes, and technological innovation.

Alongside my law degree, I am pursuing a Masters in Bioethics and Science Policy. I have spent my law school summers working in public service roles, helping government agencies to confront the obstacles posed by novel public health threats and rapidly developing biotechnologies. I hope to help prepare your court to address these evolving challenges.

I have enclosed my resume, Duke Law transcript, and a draft of a Supreme Court commentary that I authored for the Duke Journal of Constitutional Law & Public Policy. Letters of recommendation from Professor Sarah Bloom Raskin, Professor Stuart Benjamin, and Professor Michael Waitzkin are included. Please contact me if you would like any additional materials or information. Thank you in advance for your consideration.

Sincerely,

Benjamin A. Spencer

BENJAMIN A. SPENCER
4225 Larchmont Road #1127, Durham, NC 27707 | bas108@duke.edu | (864) 492-2601

EDUCATION

Duke University School of Law, Durham, NC
Juris Doctor and *Masters of Bioethics and Science Policy* expected, May 2024
GPA: 3.65
Honors: B.S. Womble Scholarship
Interscholastic Transactional Law Competition, *First Place – Drafting*
Activities: Duke Bar Association, *Treasurer*
Duke Journal of Constitutional Law and Public Policy, *Special Projects Editor*
Duke Law and Technology Review, *Content Editor*
Duke Environmental Law and Policy Forum, *Executive Editor*
Transactional Law Society, *Executive Board Member*
Publications: *It Ain't Real Funky Unless It's Got That Pop: Artistic Fair Use After* Goldsmith, Duke Journal of Constitutional Law and Public Policy, January 2023

University of South Carolina, Columbia, SC
Bachelor of Arts with Honors in Philosophy and Political Science, *summa cum laude*, May 2021
GPA: 3.99
Honors: Josiah Morse Award in Philosophy
Thesis: *American Absurdity: Comparing the Absurd in European and American Literature*
Study Abroad: Sonoma State University, Santa Rosa, CA, Fall 2019
University of Kent, Canterbury, United Kingdom, Spring 2020
Activities: WUSC-FM & HD-1 Columbia, *DJ*
UofSC Department of Psychology, *Neuroscience Research Assistant*

EXPERIENCE

Food and Drug Administration, Office of the Chief Counsel, Silver Spring, MD
Legal Support Intern, Summer 2023
- Analyzed statutes and cases to draft briefs and legislative proposals with litigators and counsel.

National Institutes of Health, Bethesda, MD
Legal Research Assistant, May 2022 – July 2022
- Conducted nationwide survey of statutes, regulations, and university policies governing the participation of wards of the state in human research.

Target, Rock Hill, SC
Fulfillment Expert, May 2021 – August 2021
- Retrieved and packaged online orders under strict time limitations.

McGowan, Hood & Felder, Rock Hill, SC
Legal Assistant, May 2019 – June 2020
- Assisted with depositions, mediations, trials, research, and drafting in medical malpractice cases.

South Carolina Department of Justice, York, SC
Judicial Intern, June 2018 – August 2018

ADDITIONAL INFORMATION

Publication: *Ethical Design: Policy Direction for Privacy in Emerging Biotechnologies and the Internet of People*, University of Alabama's Capstone Journal of Law and Public Policy, December 2019; presented paper at conference. Student Curator Extern at Smithsonian Institute, 2018. Authored forty-five magazine columns during high school for local magazine. Wrote ten novel-length works. Eagle Scout.

DUKE UNIVERSITY - Unofficial Transcript

Name: **Benjamin A. Spencer**
Student ID: **2380951**

6/6/2023

Academic Program History

Program: **Grad - Masters Bioethics**
(*Status: Active in Program*)
Plan: **Bioethics and Science Policy - Master's** *(Primary)*

Beginning of Graduate Record

2022 Spring Term

Course		Description	Units Earned	Official Grade	Grading Basis
BIOETHIC	605	CONTEMPORARY ISSUES	1.500	CR	CNC

Term GPA: 0.000 Term Earned: 1.500
Cum GPA: 0.000 Cum Earned: 1.500

2022 Summer Term 1

Course		Description	Units Earned	Official Grade	Grading Basis
BIOETHIC	705	CAPSTONE: BIOETHICS & SCI POL	4.500	A	GRD

Term GPA: 4.000 Term Earned: 4.500
Cum GPA: 4.000 Cum Earned: 6.000

2022 Summer Term 2

Course		Description	Units Earned	Official Grade	Grading Basis
BIOETHIC	705	CAPSTONE: BIOETHICS & SCI POL	4.500	A	GRD

Term GPA: 4.000 Term Earned: 4.500
Cum GPA: 4.000 Cum Earned: 10.500

2022 Fall Term

Course		Description	Units Earned	Official Grade	Grading Basis
BIOETHIC	704	SCIENCE LAW AND POLICY	3.000	A	GRD
LAW	250	FAMILY LAW	2.000	A-	GRD
RESEARCH	1	RESEARCH	3.000	-	NOG

Term GPA: 3.880 Term Earned: 8.000
Cum GPA: 3.957 Cum Earned: 18.500

2023 Spring Term

Course		Description	Units Earned	Official Grade	Grading Basis
BIOETHIC	591	TOPICS IN SCIENCE POLICY	3.000	A	GRD
LAW	347	HEALTH CARE LAW/POLICY	3.000	A	GRD

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DUKE UNIVERSITY - Unofficial Transcript

Name: **Benjamin A. Spencer**
Student ID: **2380951**

6/6/2023

Term GPA:	4.000	Term Earned:	6.000
Cum GPA:	3.970	Cum Earned:	24.500

Graduate Career Earned

Cum GPA:	3.970	Cum Earned:	24.500

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DUKE UNIVERSITY - Unofficial Transcript

Name: **Benjamin A. Spencer**
Student ID: **2380951**

6/6/2023

Academic Program History

Program: **Law School**
(*Status: Active in Program*)
Plan: **Law (JD)** *(Primary)*
Subplan:

Beginning of Law School Record

2021 Fall Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	110	CIVIL PROCEDURE	4.500	3.8	GRD
LAW	130	CONTRACTS	4.500	3.3	GRD
LAW	160A	LEGAL ANLY/RESEARCH/WRIT	0.000	CR	CNC
LAW	180	TORTS	4.500	3.4	GRD

Term GPA: 3.500 Term Earned: 13.500

Cum GPA: 3.500 Cum Earned: 13.500

2022 Spring Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	120	CONSTITUTIONAL LAW	4.500	3.5	GRD
LAW	140	CRIMINAL LAW	4.500	3.6	GRD
LAW	160B	LEGAL ANLY/RESEARCH/WRIT	4.000	3.3	GRD
LAW	200	ADMINISTRATIVE LAW	3.000	3.8	GRD

Term GPA: 3.534 Term Earned: 16.000

Cum GPA: 3.518 Cum Earned: 29.500

2022 Summer Term 2

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	614	JD PROFESSIONAL DEVELOPMENT	0.000	CR	PFI

Term GPA: 0.000 Term Earned: 0.000

Cum GPA: 3.518 Cum Earned: 29.500

2022 Fall Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	170	PROPERTY	4.000	3.8	GRD
Course Topic:		**2L JDs only**			
LAW	210	BUSINESS ASSOCIATIONS	4.000	4.0	GRD
LAW	240	ETHICS PROF RESPONSIBILITY	3.000	3.5	GRD

Term GPA: 3.790 Term Earned: 11.000

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DUKE UNIVERSITY - Unofficial Transcript

Name: **Benjamin A. Spencer** **6/6/2023**
Student ID: **2380951**

Cum GPA: 3.592 Cum Earned: 40.500

2023 Winter Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	800	BASICS OF ACCOUNTING	0.500	CR	CNC
LAW	848	INSURANCE LAW	0.500	CR	CNC

Term GPA: 0.000 Term Earned: 1.000

Cum GPA: 3.592 Cum Earned: 41.500

2023 Spring Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	245	EVIDENCE	3.000	3.9	GRD
LAW	270	INTELLECTUAL PROPERTY	4.000	4.0	GRD
LAW	307	INTERNET & TELECOM REGULATION	3.000	3.8	GRD
LAW	329	EDUCATION LAW	2.000	3.5	GRD
LAW	628	JD LEGAL WRITING	0.000		NOG

Term GPA: 3.841 Term Earned: 12.000

Cum GPA: 3.649 Cum Earned: 53.500

2023 Summer Term 2

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	614	JD PROFESSIONAL DEVELOPMENT	0.000		PFI

Term GPA: 0.000 Term Earned: 0.000

Cum GPA: 3.649 Cum Earned: 53.500

Law School Career Earned

Cum GPA: 3.649 Cum Earned: 53.500

UNOFFICIAL TRANSCRIPT

THIS IS NOT AN OFFICIAL TRANSCRIPT – FOR REFERENCE ONLY

Michael B. Waitzkin
Deputy Director
(202) 528-1684 (cell)
michael.waitzkin@duke.edu

March 15, 2023

Re: reference for Ben Spencer

I am writing to enthusiastically recommend Ben Spencer for a judicial clerkship.

While pursuing his JD degree, Ben has also enrolled in a joint Master of Arts in Bioethics & Science Policy. I am the Director of Graduate Studies for the MA degree and therefore know Ben as both an advisee and student. I have taught Ben in three classes and have had several long conversations with him about his background and career goals.

Ben is not a typical Duke Law student. He comes from a very small town – I believe the smallest town in South Carolina. He attended public schools and graduated summa cum laude from the University of South Carolina with honors in Philosophy and Political Science. He is a disc jockey, plays the bass guitar, knits hats, scarfs and sweaters, has written ten "terrible"novels – his words not mine, and is still an excellent law student.

When asked to distill his study of philosophy into a few words, he chose two – "Be Honest".
Ben strikes me as a person of great integrity. He comes to his own views on complex issues, always thoughtful and considered, and wholely unaffected by the overwhelming consensus opinions of the Duke Law student body. This is not to suggest that he applies a contrarian philosophy to his decision-making. To the contrary, his study of bioethics and science policy has reinforced his perspective that decisions should be made based on the facts and the science, not someone's preferred version of facts or their disregard of science or law. For this reason, I believe he will be an excellent law clerk – he will follow the law, apply the facts and inform the decision by an understanding of the applicable science.

His major interest is in regulatory law and his summer work at the National Institutes of Health and the Food and Drug Administration inform this goal.

I have taught Ben in three different courses, and he consistently performed at the top of the class. Science Communication, a core MA course, focused on how to relay complex scientific information in a comprehensible and manageable way for the intended audience. Course assignments included the recording of a podcast, in which Ben excelled due to his prior experience on the radio both at the University of South Carolina and at Duke. He also was required to build a website from the ground up, which allowed him to further develop skills in accessible writing and design. Later, he put those skills to practical use in volunteering to repair *De Novo*, an introductory website for Duke Law students that hadn't been updated in thirteen years. Despite many other pressures on his schedule, he made time for this because he knew how helpful it would be for the many terrified 1L students – as he had been.

Science Law and Policy is a course in which graduate ethics, law, and STEM doctoral students work to develop policy solutions to complex problems regarding technology and bioscience. His insights often

Duke SCIENCE & SOCIETY

MICHAEL B. WAITZKIN
DEPUTY DIRECTOR
(202) 528-1684 (CELL)
MICHAEL.WAITZKIN@DUKE.EDU

focused on the practical impacts of a policy or regulation, and how it would be implemented in actuality—it was paramount to him that the theoretical basis for any rule be sound, but such a rule would crumble, no matter how strong the foundation, if impracticable. The subtext of the class, which he keenly perceived, was that in order to craft effective policy, all of these disciplines must be at the table together and they must all know how to speak to one another.

Finally, Ben is currently participating in a group readings course with the other JD/MA students, a small cohort that lends itself to his speaking style. Our reading selections focus on how the development of technology has altered our conceptions of privacy, and Ben has not been content to take those readings at face value. Instead, he investigates potential methodological flaws in the studies that the authors cite; he questions the philosophical foundations of the books; he challenges the definitions offered for certain terms, such as a "civil right to intimate privacy."

Outside of class, I have seen him handle difficult situations under considerable pressure. During his 1L year, he interviewed with several nonprofits, firms, and agencies about potential employment for the summer of 2022 which would inform his interest in regulatory law, before finally settling on an internship with the National Institute of Environmental Health Science. He had this job lined up for months—and then, weeks before he was due to start and in the middle of spring exams, the internship position was eliminated. In response, he worked with his prior almost-employer to leverage connections within the other National Institutes of Health to find a replacement position, all while intensively preparing for exams, planning social events for the law school, and recovering from COVID. Within a couple of weeks, he landed on his feet at the NIH Department of Bioethics – which was probably a better job for him - performed well on his exams, and then immediately got to work applying for student journal memberships.

Ben will be working at the Food and Drug Administration, Office of the Chief Counsel, this coming summer. Before securing this position, he interviewed on-campus with multiple law firms without success. For someone who had performed well in class, had a dedicated commitment to a particular area of expertise, and had found leadership roles in many student organizations, it was an unexpected result that I could tell was hard for him to deal with. After struggling with this disappointment, he reached out to me and we met for lunch. We talked about the kinds of firms he had been applying to, his general interview strategies, and what he was looking for in the longer term. Throughout the conversation, it was clear to me that he was applying for jobs that he didn't really want, just because the prevailing culture in the law school told him that he should. I am confident that in his interviews with these firms, consciously or not, he was unable to disguise his lack of passion for the jobs. I asked a few more questions, and ultimately realized that, above all, Ben wants to do something that matters, something that will serve society. And what matters above all to Ben is getting to the *truth* and doing it in the *right way* – above all "Be Honest". Thus, he was ultimately successful in securing his FDA summer position, which better aligns with his interests and goals.

I am glad to see Ben pursuing a clerkship, because it is a natural extension of his talents and commitments to public service. I think the insights he will obtain working within the judicial system

Michael B. Waitzkin
Deputy Director
(202) 528-1684 (cell)
michael.waitzkin@duke.edu

will be invaluable in his future career. Whether as a student or as a clerk, he is deeply committed to making sure that his work is done properly, thoroughly and efficiently. I am confident that he would bring those qualities to your chambers, and wholeheartedly recommend him to you.

Sincerely,

Michael B. Waitzkin

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Benjamin Spencer

Dear Judge Walker:

I am writing to encourage you to hire Benjamin Spencer as a law clerk. I think very highly of him, and I think he will be a very strong clerk.

Ben did something a bit bold: he took my Administrative Law class in his first year. This is a new option at Duke (my spring 2022 offering of the class was the first time that first-year students had been allowed to take it), and few first-year students took it – the vast majority of the students in the class were second- and third-year students. To be blunt, it was fairly clear to me who the first-year students were: having had only one semester of law school, they did not have the same level of understanding and knowledge that the upper-level students did. Ben was the exception. I call on students randomly and accept some volunteers, and I found that Ben's comments in both situations were unusually careful and insightful. He consistently demonstrated that he had reflected on the materials and thought through their implications. He evinced the analytical abilities that are characteristic of good lawyers and good law clerks – seeing and understanding the big picture while retaining a keen grasp of the details. I was unsurprised to see that his exam was one of the strongest in the class.

Ben is personable and engaging, but not flashy. Some people bounce off the walls with energy or talk a mile a minute. Ben is not one of them. He is fairly quiet and self-effacing, at least when first meeting people. This can appear to be simple shyness, but my sense is that it reflects that he likes to think deeply about questions and avoids glibness. It may also reflect the fact he comes from a very small rural town (if a community of 45 people can even be called a "town").

Ben is a straight shooter who spends little time trying to position himself. He is not a self-promoter. He takes ideas seriously and really loves thinking through the implications of different legal arguments, but he does not take himself too seriously. He sees both sides of an argument and articulates his positions carefully without being arrogant or unpleasant. He demonstrates good judgment and is friendly even when he disagrees with others. I think all of this will serve him well as a clerk. Indeed, I think he will fit in well in any chambers.

I clerked on two different courts and have known many clerks and judges over the years, and I believe I have a sense of the qualities that make for a good law clerk. Ben has those qualities in abundance. He will be a great clerk.

Sincerely,

Stuart M. Benjamin
William Van Alstyne Professor of Law

Stuart M. Benjamin - Benjamin@law.duke.edu - (919) 613-7275

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 11, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Benjamin Spencer

Dear Judge Walker:

I write this letter of recommendation with enthusiasm in support of my student, Benjamin Spencer. Benjamin is a person whose competencies in writing, analysis and temperament will contribute to his success as a judicial clerk.

Benjamin is one of my most thoughtful, curious, earnest, and humble students. He grew up in the smallest town in South Carolina (45 people) and found his way to Duke Law School, where he was one of the highest performers in my Business Association course. He is intent on understanding all that he can and is refreshingly authentic in his demeanor. (For example, ask him about the role of courts and you will learn that they may have a role in promoting honesty.) Benjamin speaks in a considered way, with clarity and precision. His responses are balanced and considered, distinctive and original. Amongst many fine students, Benjamin is a standout for his quiet fortitude and humility.

I believe Benjamin is the type of well-rounded law student who could fit in nearly any court. He expresses sincere interest in regulatory law, from the perspectives of case law, its doctrinal tensions, and its administration. His decision to work at the Food and Drug Administration shows perhaps that he thinks for himself.

Benjamin thinks deeply inside boundaries but also across them. He is a pleasure to be around and has a wry sense of humor. (For example, ask him about the ten novels he wrote, and he will describe most of them as “terrible”. But several of them are about teenage superheroes who slay all kinds of monsters while struggling to be understood by their families.) Benjamin would be a quiet delight to have in chambers, would be thoughtful, insightful, and disciplined, and would serve a Court in an exemplary way.

Should you have questions of a specific nature, please do not hesitate to contact me.

Very truly yours,

Sarah Bloom Raskin
Colin W. Brown Distinguished Professor of the Practice
Distinguished Fellow, Global Financial Markets Center
Senior Fellow, Duke Center on Risk

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Writing Sample

This is a commentary on the Supreme Court case *Andy Warhol Foundation for the Visual Arts v. Goldsmith*. It is an academic piece written for the Duke Journal of Constitutional Law & Public Policy. A final line-edited version was published in January 2023. This version, completed in November 2022, has not been line-edited and has only incorporated general content feedback from two readers.

In 1981, Linda Goldsmith took a photograph of Prince. This photograph was then used by Andy Warhol for his *Prince Series*, a collection of silkscreens that was licensed for publication in both Vanity Fair and Condé Nast magazines. Following Prince's death in 2016, Goldsmith became aware of the Warhol works and argued that they were derivative uses of her original photograph. The District Court disagreed, and classified the *Prince Series* as fair use in a declaratory judgment for the Andy Warhol Foundation for the Visual Arts (AWF). The Second Circuit reversed, stating that the District Court had impermissibly considered the alleged "meaning or message" of the *Prince Series* in conducting its fair use analysis. AWF appealed, and the Supreme Court granted certiorari. This commentary was dedicated to analyzing the current extent of the safe harbor of fair use, exploring how the Second Circuit departed from established fair use precedent, predicting what the Supreme Court will decide, and recommending to the Court a path forward.

On May 18, 2023, the Supreme Court released an opinion that affirmed the judgement of the Second Circuit and, in very limited language, altered how courts are to evaluate claims of fair use. Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258 (2023). This commentary was incorrect in its prediction of how the Court would rule.

To decrease the page count, I have deleted the text and corresponding footnotes dedicated to discussing the oral arguments of the Petitioner, Respondent, and Unites States as amicus curiae before the Supreme Court. I am happy to send the complete document upon request, and the published line-edited version is available online.

It Ain't Real Funky Unless It's Got That Pop: Artistic Fair Use After *Goldsmith*

Benjamin A. Spencer

I. INTRODUCTION

Born Prince Rogers Nelson, Prince was one of the most influential artists in history, transforming rock and pop music by drawing from his roots in Black funk and soul to assert an undeniable charisma and sexuality in his work.[1] Though people largely agree that Prince was a transformative musician, there is considerably more debate on whether Andy Warhol was a transformative artist.[2] This case presents an opportunity for the Supreme Court to weigh in on the nature of transformation in art, and what role that transformation may play in a proper fair use analysis.

In *Andy Warhol Foundation for the Visual Arts v. Goldsmith*, the Court will decide whether modification of an artwork's "meaning or message" suffices as "transformative" under the Court's established four-factor fair use analysis test.[3] Further, it will have the opportunity to clarify the sources of meaning and message that courts may consider, which may potentially include the artist's stated intentions, critical reviews, or a lay observer's interpretations.

The Court ought to find that a work's meaning or message can be considered when evaluating "transformativeness" under the four-factor balancing test. Such a finding would encourage continual development, innovation, and discourse in art and public expression, while protecting artists in a pop art culture built on commodification. To find otherwise would almost categorically eliminate the field of pop art and unduly restrict artists' ability to convey

[1] JOHN COVACH & ANDREW FLORY, WHAT'S THAT SOUND?: AN INTRODUCTION TO ROCK AND ITS HISTORY 414 (5th ed. 2018).
[2] Melissa Rossato, *The contradictions of Warhol: more than pop and color*, THE COLUMBIA CHRONICLE (Jan. 22, 2020), https://columbiachronicle.com/the-contradictions-of-warhol-more-than-pop-and-color.
[3] Petition for a Writ of Certiorari, Andy Warhol Foundation for the Visual Arts v. Goldsmith, U.S. (2022) (No. 21–869), 2021 WL 5913520, at i.

commentary and criticism. This decision would also comport well with long-established precedent and comply with the constitutional goal of "promoting the Progress of Science and useful Arts."[4]

II. FACTS

In 1981, Linda Goldsmith arranged to photograph the up-and-coming pop sensation Prince.[5] Prince attended the photography session for less than an hour and appeared uncomfortable and nervous around the lights and cameras.[6] He wore his own clothes to the studio and did not change his wardrobe, though Goldsmith did provide him with a black sash and lip gloss to show that he was "in touch with the female part of himself."[7] The photographs from this session went unpublished.[8]

Subsequently, Vanity Fair approached Goldsmith in 1984 to license a photograph for use in a forthcoming magazine article on Prince entitled *Purple Fame.*[9] Goldsmith knew that the selected photograph would be used as an artist's reference and was compensated $400 by Vanity Fair.[10] She did not know that Andy Warhol was the artist involved.[11] Warhol proceeded to create the *Prince Series,* using Goldsmith's photograph to create a group of sixteen artworks with his iconic color flattening and silkscreen techniques.[12] One of the pieces, *Purple Prince,* was used in the 1984 Vanity Fair article, and Goldsmith was credited as the original photographer.[13] She did not look at the article at the time.[14]

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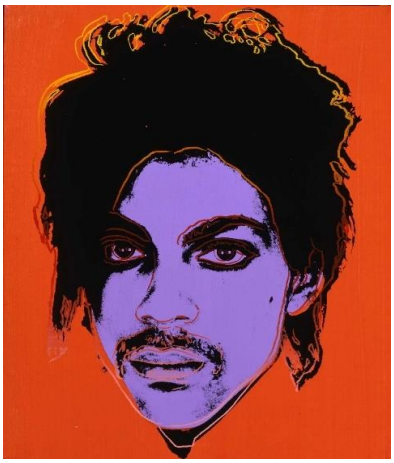
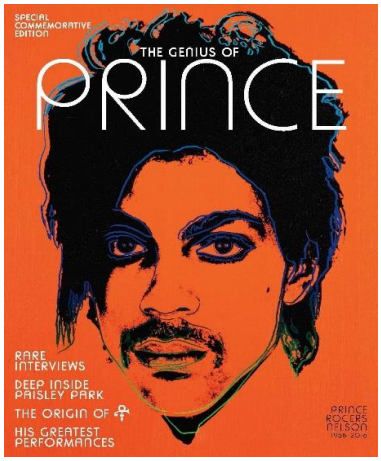
[4] U.S. CONST. art. I, § 8, cl. 8.
[5] Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312, 318 (S.D.N.Y. 2019).
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.* at 319.
[13] *Id.* at 318.
[14] *See* id. at 321.

Linda Goldsmith's original 1981 photograph of Prince.[15]



Purple Prince as used in the 1984 Vanity Fair article, "Purple Fame."[16]



Orange Prince as used in the 2016 Condé Nast commemorative edition.[17]

In the following years, the constituent artworks of the *Prince Series* were sold to museums and private collections.[18] After Andy Warhol's death in 1987, the Andy Warhol Foundation for the Visual Arts (AWF) assumed management and licensing of his artwork.[19]

When Prince died in 2016, Condé Nast approached AWF to license *Orange Prince* from the *Prince Series* as the cover art for a retrospective on Prince's life and career.[20] Condé Nast paid AWF $10,000 for the licensing, and Goldsmith was not credited as the original photographer.[21] This time, Goldsmith saw *Orange Prince* on the magazine cover and recognized that the photograph underlying Warhol's work was the one she had taken years earlier.[22]

Goldsmith approached AWF, demanding a substantial payment for what she believed was an unauthorized, infringing use of her copyright. She argued that the *Prince Series* was a

[15] Answer and Counterclaim at 14, Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312 (S.D.N.Y. 2019) (No. 17-cv-02532-JGK), 2017 WL 6818950.
[16] Tristan Vox, *Purple Fame*, VANITY FAIR, Nov. 1984, at 66.
[17] The Genius of Prince: Special Commemorative Edition (Tom Prince ed.) (2016).
[18] *Goldsmith*, 382 F. Supp. 3d at 320.
[19] *Id.*
[20] *Id.* at 321.
[21] *Id.*
[22] *Id.*

derivative work and that the law conferred to her, as the original artist, the exclusive right to control the photograph.[23] AWF, recognizing that litigation was imminent, sought a declaratory judgment from the Southern District of New York that *Orange Prince* and the remainder of the *Prince Series* were protected under fair use and were therefore not derivative works.[24] Goldsmith counterclaimed, asserting that the district court should declare that the *Prince Series* was derivative, grant her compensation for all past licensing uses, issue a permanent injunction on future licensing, and award her the copyright for the entire *Prince Series.*[25]

The district court engaged in a fair use analysis and granted AWF's request for a declaratory judgement, finding that *Orange Prince* was transformative as a matter of law and therefore protected under fair use.[26] Notably, the court stated that the "*Prince Series* works can reasonably be perceived to have transformed Prince from a vulnerable, uncomfortable person to an iconic, larger-than-life figure."[27] The remaining factors, including the creative nature of the secondary work, did not detract from this finding.[28] Goldsmith appealed to the Second Circuit, arguing that the district court had incorrectly and impermissibly weighed the claim of transformation.[29]

III. LEGAL BACKGROUND

The goal of copyright law is to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective

[23] Complaint at 24, Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312 (S.D.N.Y. 2019) (No. 1:17-cv-02532), 2017 WL 1330503.
[24] *Id.* at 2.
[25] Answer and Counterclaim at 27, Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith, 382 F. Supp. 3d 312 (S.D.N.Y. 2019) (No. 17-cv-02532-JGK), 2017 WL 6818950.
[26] *Goldsmith*, 382 F. Supp. 3d at 331.
[27] *Id.* at 326.
[28] *Id.* at 327.
[29] Andy Warhol Foundation for the Visual Arts v. Goldsmith, 11 F.4th 26, 32 (2nd Cir. 2021)

Writings and Discoveries."[30] This constitutional grant of power allowed Congress to pass several copyright statutes, which the courts have expounded upon. In determining the boundaries of fair use, there is a tension between balancing the right of original creators to control their works and works derived from it and the benefit of creating a safe harbor for those who take copyrighted works and build upon them.[31]

1. Copyright Act of 1976

Ordinarily, the original author of a work has the right "to prepare derivative works based upon the copyrighted work."[32] A derivative work is defined as "a work based upon one or more preexisting works, such as a translation… art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted."[33]

The Copyright Act of 1976 recognized that subjecting all secondary uses of a work to the original author's control as derivatives would unduly restrict the ability of others to build upon and further develop that work. Thus, the goal of fair use is to provide a safe harbor for those who use copyrighted works for "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research…."[34] The four factors to be considered when evaluating whether a secondary work is fair use are:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[35]

[30] U.S. CONST. art. I, § 8, cl. 8.
[31] *See* Folsom v. Marsh, 9 F. Cas. 342, 345, 349 (D. Mass. 1841) (supporting the defense for "fair and reasonable criticism" and praising the adaptation of Washington's letters for school libraries).
[32] 17 U.S.C. § 106(2)
[33] 17 U.S.C. § 101
[34] 17 U.S.C. § 107
[35] *Id*.

From this statutory baseline, the Supreme Court has explored, affirmed, and reaffirmed the guiding lights of the fair use inquiry.

2. Common Law Precedent

The earliest articulation of fair use was in *Folsom v. Marsh*, which involved two competing biographies of George Washington that used the first president's unpublished personal letters as the basis for the narrative.[36] The courts used Justice Story's articulation of fair use as common law until the Copyright Act of 1976 adopted the standard into statute, and it still contains persuasive power today.[37] As Justice Story explained, the duty of the judge in a fair use case is to "look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the original work" in rendering a judgment.[38]

The Supreme Court examined the four-factor test after the passage of the Copyright Act of 1976, this time in the context of a magazine publishing excerpts from President Gerald Ford's memoirs before his autobiography was released.[39] This case contains three valuable insights. The first is the importance of the fourth factor—when there is a substantial impact on the market for the original work, the court is unlikely to find fair use.[40] The second is the nature of the copying—duplicating incidental qualities of a work is more acceptable than copying the "heart of the work."[41] Even a small amount of copying can be infringement if it duplicates what was special and vital about the original work. Finally, fair use is an affirmative defense that must be

[36] Folsom v. Marsh, 9 F. Cas. 342, 345 (D. Mass. 1841).
[37] *See, e.g.*, Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576 (1994) (praising *Folsom* as "distilling the essence of law and methodology"); Harper & Row v. Nation Enterprises, 471 U.S. 539, 550 (1985) (using *Folsom* as guidance for a fair use analysis).
[38] Folsom, 9 F. Cas at 348.
[39] Harper & Row, 471 U.S. at 542-43 (1985).
[40] *Id*. at 566.
[41] *Id*. at 564.

proven—otherwise, the allegedly infringing work is derivative and the creator of the original work can exercise control.[42]

The foundational fair use case is *Campbell v. Acuff-Rose Music, Inc.*, which examined the doctrine in 2 Live Crew's parody of Roy Orbison's "Pretty Woman."[43] Although parody is the paradigmatic example of fair use, the *Campbell* test has been used for other, non-parodic analyses as well.[44] The Court began by noting that the nature of fair use precludes the application of bright line rules, and that the factors need to be weighed holistically.[45]

Prior to *Campbell*, the strongest articulation of the first factor, referring to the purpose and character of the use, was that "every commercial use is presumptively unfair."[46] However, the Court takes care here to demonstrate that there is far more to this factor than commercial use.[47] Rather, the first factor is aimed at discerning if the new work merely "supersedes the original,"[48] or if it "instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.'"[49] The introduction of the word "transformative" to the fair use inquiry is taken from a law review article by Judge Pierre Leval, who defined the term to include criticism, exposing the character of the original author, proving a fact, debating ideas in the original, parody, symbolism, aesthetic statements, and "innumerable other uses."[50] *Campbell's* critical question is whether the new work could "reasonably be

[42] *Id.* at 561.
[43] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 572-573 (1994).
[44] *See* Nunez, *supra* note 56.
[45] Campbell, 510 U.S. at 577.
[46] Sony Corp. of America v. Universal City Studios, 464 U.S. 416, 451 (1984).
[47] Campbell, 510 U.S. at 584.
[48] Folsom v. Marsh, 9 F. Cas. 342, 348 (D. Mass. 1841).
[49] Campbell, 510 U.S. at 579.
[50] Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARVARD L. REV. 1105, 1111 (1990). This specific language is a helpful guide, but was not adopted in Campbell, and as such is not binding.

perceived" as conveying a new meaning or message."[51] The more transformative the work, the less that commercialism and other factors matter.[52]

Campbell revolved around parody, and much of the other law surrounding the other factors in the fair use inquiry is not directly applicable to the present matter. The fourth factor, regarding the impact of the secondary work on the market for the original, continues to play a significant role.[53]

Appellate courts have had myriad opportunities to apply *Campbell* in the context of transformative fair use analysis over the years. The case closest to the facts of *Goldsmith* comes out of the Seventh Circuit, where a Wisconsin clothing company took a photograph of the mayor of Madison, changed the color to a bright lime green, and added the caption "Sorry for Partying."[54] Looking at the meaning or message of the work, the Seventh Circuit found that it was a form of political commentary, and thus transformative for the purposes of fair use.[55] Similar cases have been heard in the First, Third, Fourth, Sixth, Ninth, and Federal Circuits.[56]

The Supreme Court most recently discussed fair use in the context of computer code. Google copied basic Java program building tools verbatim into its Android platform to

[51] Campbell, 510 U.S. at 583.
[52] *Id.* at 579.
[53] *See id.* at 590 (since free use is an affirmative defense, the alleged infringer has the burden of providing evidence about market impact, though there is not an automatic inference of market harm); *cf.* WEIRD: THE AL YANKOVIC STORY at 23:00 (Funny or Die 2022) (exploring the commercial value of parody when the original work remains available).
[54] Kienitz v. Sconnie Nation LLC, 766 F. 3d 756, 757 (7th Cir. 2014).
[55] *Id.* at 759.
[56] *See, e.g.,* Nunez v. Caribbean International News Corp., 235 F.3d 18 (1st Cir. 2000) (finding new meaning in the republication of photographs to criticize the individual portrayed); Murphy v. Millennium Radio Group, LLC, 650 F.3d 295 (3d Cir. 2011) (the mere reproduction of a photograph on a website lacked any new meaning); Brammer v. Violent Hues Productions, LLC, 922 F.3d 255, 261, 263-64 (4th Cir. 2019) (no new meaning was added when a photograph was replicated for the sole purpose of portraying the subject of the photograph); Balsley v. LFP, Inc., 691 F.3d 747 (6th Cir. 2012) (searching for meaning in a magazine's usage of a preexisting photograph); Seltzer v. Green Day, 725 F.3d 1170 (9th Cir. 2013) (using a photograph as a concert backdrop added new meaning when contrasted with the performance); Gaylord v. United States, 595 F.3d 1364 (Fed. Cir. 2010) (a reproduction of the Korean War Memorial on a postage stamp did not add new meaning or criticism).

encourage developers to create cross-compatible apps.[57] The term "transformative" was clarified to mean the "add[ition] of something new and important."[58] Though the dissent disagreed on the applicability of fair use to computer code, their articulation of transformation similarly recognized the value of adding new purpose to a work: "To be transformative, a work must do something fundamentally different from the original. A work that simply serves the same purpose in a new context… is derivative, not transformative."[59] Interestingly, Justice Breyer explicitly stated that Andy Warhol's *Soup Cans* is a paradigmatic example of fair use.[60]

Emerging from *Google*, the current Supreme Court precedent is that the fourth factor's consideration of the impact on the market for the original work is important, that copying the heart of the work will weigh against an affirmative defense of fair use, and, critically, that one can consider the meaning or message in evaluating transformativeness under the first factor. The more transformative the use, the greater the likelihood the use is fair. In some cases, sufficient transformativeness may be dispositive.

IV. THE SECOND CIRCUIT'S HOLDING

The Second Circuit originally decided in favor of Goldsmith before the Supreme Court handed down *Google*.[61] Upon petition by AWF, the panel reheard the case to evaluate whether *Google* affected the outcome.[62] Deciding that *Google* did not refute their reasoning, the panel modified and rereleased its prior opinion.[63] The Second Circuit concluded that second, third, and fourth factors favored Goldsmith. The current controversy surrounds the court's treatment of the first factor.

[57] Google LLC v. Oracle America, Inc., 141 S. Ct. 1183, 1191 (2021).
[58] *Id.* at 1203.
[59] *Id.* at 1219.
[60] *Id.* at 1203.
[61] Andy Warhol Foundation for the Visual Arts v. Goldsmith, 11 F.4th 26, 51 (2nd Cir. 2021).
[62] *Id.*
[63] *Id.*

On appeal to the Second Circuit, Goldsmith argued that the district court's finding of fair use was "grounded in a subjective evaluation of the underlying artistic message of the works rather than an objective assessment of their purpose and character."[64] The Second Circuit agreed, and it held that neither the actual or perceived intent of the artist, nor the impressions of the meaning or message of an artwork by a critic or judge can be considered when evaluating if a work is transformative.[65] Because the meaning of the artwork cannot be considered, artworks such as those by Andy Warhol become the mere imposition of another style onto a preexisting copyrighted work.[66] *Orange Prince* and the entire *Prince Series* thus become derivative works sharing the exact same purpose as Goldsmith's original photo—to serve as portraits of Prince, regardless of potential interpretations of meaning or message.[67]

The Second Circuit leaves open only two avenues for meaning or message to play a role in evaluating transformation. The first is if the new work is commenting on the original work from which it draws inspiration. Absent such relation, the assertion of a "higher or different artistic use" is insufficient to show transformation.[68] The second is a collage, which is comprised of "distinct works of art that draw from numerous sources, rather than works that simply alter or recast a single work with a new aesthetic."[69]

Outside of these avenues, purpose and character under the first factor can only be assessed by looking to whether the use of the source material was necessary for a "fundamentally different and new artistic purpose and character, such that the secondary work stands apart from

[64] *Id.* at 32.
[65] *Id.* at 42.
[66] *Id.*
[67] *Id.*
[68] Rogers v. Koons, 960 F.2d 301, 310 (2nd Cir. 1992). The Second Circuit has previously stated in dicta that Warhol's *Marilyn Triptych* is exactly the kind of transformational commentary that is protected by fair use. Cariou v. Prince, 714 F.3d 694, 706 (2nd Cir. 2013).
[69] Goldsmith, 11 F.4th at 41.

the raw material used to create it."[70] The Court discarded the standard articulated in *Campbell* and used by the district court. This articulation of transformativeness is more restrictive than that previously utilized in the Second Circuit's precedent, where it was permissible to consider the size, color, general composition, and nature of the works.[71]

V. ORAL ARGUMENT

[TEXT AND CORRESPONDING FOOTNOTES HAVE BEEN OMITTED]

VI. ANALYSIS

In *Campbell's* articulation of the first factor, a different purpose and character was taken to include a new meaning and message.[72] This interpretation was affirmed in *Google,* as the addition of something "new and important" satisfied the first factor.[73] The Second Circuit wrote this consideration out of their analysis, resting their decision on the impossibility of objective interpretations of meaning and message and the commercial use of *Orange Prince* within the pages of a magazine.[74] Several issues make this position untenable.

Removing consideration of meaning or message from the law would solve a nonexistent problem—in the decades since Campbell, courts have aptly demonstrated their ability to apply the fair use standard consistently and effectively.[75] Only in extreme cases would a use be so transformative that the first factor would be dispositive—in the normal course of business, it would simply remain a thumb on the scale in evaluating a fair use defense.[76]

[70] *Id*. at 42.
[71] Cariou, 714 F.3d at 706.
[72] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).
[73] Google LLC v. Oracle America, Inc., 141 S. Ct. 1183, 1203 (2021).
[74] *See* Andy Warhol Foundation for the Visual Arts v. Goldsmith, 11 F.4th 26, 41–42 (2nd Cir. 2021) (holding that all interpretations of art are subjective, and that both Goldsmith's photograph and *Orange Prince* were essentially portraits).
[75] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).
[76] *Id*.

The Second Circuit's inconsistency with binding precedent from the Supreme Court, persuasive authority from the other circuits, and its own prior holdings, is troubling. This comparison is most concerning with the case of the artist Jeff Koons, who's 2002 *Easyfun–Ethereal* collage was created by taking cutouts from several different magazines and contrasting them against each other.[77] The Second Circuit held that "changes of its colors, the background against which it is portrayed, the medium, the size of the objects pictured, [and] the objects' details"[78] were sufficient to show that the original photographs had been used "as raw material for an entirely different type of art… that comments on existing images by juxtaposing them against others."[79] Koons's artwork was therefore considered fair use.[80] Inspection of *Orange Prince* reveals that all of these criteria are met—the only salient difference being that *Orange Prince* is a silkscreen, while *Easyfun–Ethereal* is a collage drawn from multiple sources. If works that comment directly on the original and works that comment on each other are protected by fair use, then the exclusion of works that comment on social phenomena like fame, politics, and consumerism is arbitrary.

The articulation of a necessity requirement for fair use is also impractical. Requiring a particular photograph or precursor work to be necessary for an artist to convey his or her message would result in fair use rarely applying, if at all.[81] If only one photograph suitable for use as an artistic reference of a person existed, then use of it would be necessary.[82] However, if a

[77] Blanch v. Koons, 467 F.3d 244, 247 (2nd Cir. 2006).
[78] *Id.* at 253.
[79] *Id.* at 251 (quoting Castle Rock Ent., Inc. v. Carol Publishing Group, Inc., 150 F.3d 132, 142 (2nd Cir. 1998)).
[80] *Id.* at 259.
[81] The only category of fair use likely to remain eligible would be parody, because parody has the express purpose of commenting on the original and requires borrowing from that original to do so. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 580 (1994).
[82] Prior to *Campbell*, the Second Circuit had occasionally employed a necessity requirement regarding direct literary quotes from other works. Leval, whose articulation of "transformative" was accepted by the Supreme Court, disavowed the need for such a requirement as contrary to the purposes of fair use. *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARVARD L. REV. 1105, 1113-14 (1990).

second photograph existed, then neither image could meet the necessity requirement because the other photograph would be a possible alternative. Andy Warhol did not have to use Goldsmith's photograph to create the *Prince Series*—but, had he used another photographer's work, an identical controversy would arise with a different appellee.[83] The existence of multiple photographs of a person cannot render the fair use of one of them impossible.

A final point of concern is that the use of the term "transformative" for the first factor originally emerged in *Campbell*,[84] while "transform" is actually included in the statutory language regarding derivative works.[85] While ostensibly relevant, the common law histories of the words differ significantly—"transformative" was taken from a law review article and its specific, novel meaning in this context should not be neutered simply because the term shares an etymological origin with a term used elsewhere in the statute. Furthermore, 17 U.S.C. § 106 is expressly made subject to § 107 in the statutory text.[86]

The Court should reaffirm *Campbell* and reverse the Second Circuit, stating that meaning or message can be considered in evaluating the transformative nature of a work. This non-political doctrine was recently reaffirmed by six Justices in *Google*, which presented a significant stretching of the fair use defense—reversing the Second Circuit would comport well with long-established precedent while protecting the goals of fair use. After so ruling, the case could be remanded back down to the Second Circuit or District Court for a new balancing of the four factors by either judge or jury. Regardless of the factors considered, fair use is, and should always be, a holistic inquiry.

[83] Transcript of Oral Argument at 120, Andy Warhol Foundation for the Visual Arts v. Goldsmith (U.S. argued Oct. 11, 2022) (No. 21–869).
[84] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).
[85] 17 U.S.C § 106
[86] *Id.*

VII. CONCLUSION

In oral argument, Justice Gorsuch compared the application of the fair use defense to the present controversy with its application to Warhol's *Soup Cans*, observing that "this is a much harder case."[87] The goal of copyright law is to further the progress of science and useful arts by balancing the incentive of exclusive ownership rights with the incentive of a fair use safe harbor. Charting a course between the Scylla and Charybdis of unlimited free use and overly restrictive derivative works protections will be challenging. Luckily for the Court, it has a lighthouse to look to: *Campbell v. Acuff-Rose Music.* By taking meaning and message into account as one factor among many, *Campbell* laid down a practical, workable test that has been successfully invoked in many cases. Adding a necessity requirement or other hurdles would restrict artists from creating new works and fly in the face of an old commonsense maxim: "if it ain't broke, don't fix it."[88]

The Court should stand by its precedent, and not fall prey to the pleas of either side to harshly restrict or overly expand the scope of fair use. Art is objective, subjective, beautiful, ugly, original, inspired, pleasing, disgusting, satisfying, and challenging—it is this multifaceted nature that allows it to convey new meanings and messages to all viewers, be they creators, critics, laymen, or lawmen.[89] As Justice Story wisely observed about copyright law in *Folsom v. Marsh*:

> "This is one of those intricate and embarrassing questions, arising in the administration of civil justice, in which it is not, from the peculiar nature and character of the controversy, easy to arrive at any satisfactory conclusion, or to lay down any general principles applicable to all cases. Patents and copyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the

[87] Transcript of Oral Argument at 109, Goldsmith (U.S. argued Oct. 11, 2022).
[88] Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc., 784 F.2d 1325, 1347 (7th Cir. 1985) (Will, J., concurring).
[89] *See* LEO TOLSTOY, WHAT IS ART? 48, 50 (Alymer Maude trans., 1899) (1896) (essay on the role of art in conveying sensation, emotion, and knowledge).

law, where the distinctions are, or at least may be, very subtile and refined, and, sometimes, almost evanescent."[90]

[90] Folsom v. Marsh, 9 F. Cas. 342, 344 (D. Mass. 1841).

Applicant Details

First Name	**John**
Middle Initial	**N**
Last Name	**Spinner**
Citizenship Status	**U. S. Citizen**
Email Address	**jns110@uakron.edu**
Address	**Address** Street **1871 14TH ST** City **Cuyahoga Falls** State/Territory **Ohio** Zip **44223** Country **United States**
Contact Phone Number	**3309623364**

Applicant Education

BA/BS From	**University of Akron**
Date of BA/BS	**December 2021**
JD/LLB From	**University of Akron School of Law** **http://www.uakron.edu/law/career**
Date of JD/LLB	**December 1, 2023**
Class Rank	**5%**
Law Review/Journal	**Yes**
Journal(s)	**Akron Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Marcin, Phillip
pjm@uakron.edu
3309726480
Starnes, Sarah
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330 972 5291
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330-972-6361

This applicant has certified that all data entered in this profile and any application documents are true and correct.

J. Noah Spinner

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(330)-962-3364 · jns110@uakron.edu

March 28, 2023

The Honorable Jamar K. Walker
U.S. District Court for the Eastern District of Virginia
Walter E. Hoffman U.S. Courthouse
600 Granby Street,
Norfolk, Virginia 23510

Dear Judge Walker,

I am writing to apply for a clerkship with your chambers beginning in August 2024 through August 2025. I am a third-year law student at The University of Akron School of Law where I serve as the Executive Editor of Student Writing for the *Akron Law Review* and am in the top 5% of my class. I am excited to apply for a clerkship with your Chambers and the U.S. District Court for the Eastern District of Virginia as it is my desire to begin my legal career in public service to our federal courts and to explore our country. My most recent legal experience consisted of externing with the Honorable J. Philip Calabrese of the U.S. District Court for the Northern District of Ohio where I had the privilege of researching and writing matters pertaining to administrative review, civil rights, and sentencing guidelines. Outside of law school, I enjoy playing vintage baseball, the guitar, making bagels, and spending time with my significant other, Shelby.

Attached for your review are my résumé, law school transcript, and writing sample. The writing sample is a case I assisted in writing and researching, alongside Judge Calabrese and his law clerk, Vito Giannola. The case involved government officials alleging deprivation of procedural and substantive due process. The names of the parties have been changed for writing sample purposes. Letters of recommendation from the following are included herein.

Professor Martin H. Belsky
The University of Akron School of Law,
belsky@uakron.edu
(330) 972-6361

Professor Sarah Starnes
The University of Akron School of Law,
sstarnes@uakron.edu
(330) 972-5291

Dr. Phil Marcin
The University of Akron,
pjm@uakron.edu
(330) 972-6480

Hon. J. Philip Calabrese
U.S. District Court for the Northern District of Ohio,
phil_calabrese@ohnd.uscourts.gov
(Letter not provided, but listed as a reference).

Thank you for your consideration. I would welcome the opportunity to interview with you and provide any additional information, discussing the attached materials more in detail.

Sincerely,
J. Noah Spinner

J. Noah Spinner

1871 14th St., Cuyahoga Falls, Ohio 44223
(330)-962-3364 • jns110@uakron.edu

Education

The University of Akron School of Law | Akron, Ohio | Candidate for Juris Doctor, December 2023 – GPA: 3.873/4.0

- Class Rank: 2 out of 114 (top 5%)
- Joint Juris Doctor-Master of Applied Politics candidate
- Executive Editor of Student Writing, Akron Law Review
- CALI Excellence for the Future Award (Contracts, Legal Drafting, UCC Sales, and Secured Transactions)
- Dean's List and Akron Law Honors Scholar

The University of Akron | Akron, Ohio |2021

- Bachelor of Arts in Political Science, Minor in American Politics – GPA: 3.936/4.0 (Summa Cum Laude Honors)
- Ray C. and Ellen P. Bliss Political Science Scholarship, The Ray C. Bliss Institute of Applied Politics – *2018-2020*

Legal Experience

Summer Associate | Vorys, Sater, Seymour and Pease LLP – *Summer 2023*

Fellow | Property Law, University of Akron School of Law – *2023*

- Guide and facilitate the understanding of Property Law for two class sections through review sessions, presentations, and questions

Judicial Extern | United States District Court for the Northern District of Ohio, The Honorable Judge J. Philip Calabrese – *2022*

- Drafted and researched case opinions and legal memoranda for review by Judge Calabrese, including matters involving immigration, administrative review, civil rights, and sentencing variances
- Collaborated with fellow externs and Law Clerks regarding case assignments and research

Study Abroad | Ireland, The University of Missouri-Kansas City School of Law – *2022*

- Studied European Union Law and Comparative Criminal Law in Cork and Dingle, Ireland, under the instruction of Professors Dermot Cahill (Bangor University), Dana Cole (The University of Akron School of Law), and Ed Hood (The University of Missouri-Kansas City School of Law)

Fellow | Akron Law PLUS Program, Law School Admissions Council and Akron School of Law – *2021*

- Mentored future law students in a simulated law school program with an emphasis on diversity and inclusion in the legal profession

Work Experience

Beertender | Missing Falls Brewery – *2021 - Present*

- Facilitate customer experience through cheerful service and maintain facility cleanliness

Ambassador Coordinator | Summit Education Initiative – *2020*

- Coordinated, strategized, and mobilized Ambassador recruitment for an adult education program entitled "College Restart" aimed at helping adults with college experience and no degree to return to school and finish their degree program

Field Organizer | Mike Bloomberg 2020, Inc. – *2020*

- Organized and mobilized volunteers in direct voter contact, including canvassing, phone banking, and policy issued events

Mascot, "Zippy" | The University of Akron – *2018-2021*

- Responsible for boosting school spirit and morale by interacting with University students and representing the University throughout the city of Akron, the state of Ohio, and neighboring states

Candidate | 36th House Seat of the Ohio House of Representatives – *2018*

- Ran on a platform of Education, Equality, and Environment with an emphasis on youth involvement in policy decisions
- Oversaw voter outreach, communication, message delivery, and daily campaign operations
- Garnered 2,504 votes (42.2% of the vote) in a contested primary

Leadership, Service, and Interests

Eagle Scout | Scouts BSA – *2017*

- Organized and led 142 volunteers to carry out a cleanup and sustainability project at The University of Akron, Earth Day 2017

Bike MS | The National Multiple Sclerosis Society – *2012-2018*

- Fundraise donations to support research funding for Multiple Sclerosis and cycle in MS awareness rides, including "Pedal to the Point"

Vintage Base Ball | The Akron Black Stockings Vintage Base Ball Club – *2019-Present*

- Educate the community on the history and tradition of the game of "base ball" as it was played in the 1860s through active demonstrations

Other Interests

- I enjoy playing the guitar (folk rock and rock n' roll), as well as going to the cinema, and spending time with my significant other, Shelby

OFFICIAL ACADEMIC TRANSCRIPT

The University of Akron

Ronald L. Bowman, Jr., University Registrar

Name: John Spinner
Student ID: 4281569

SSN: xxx-xx-9928
Birthdate: 01-04-xxxx
Print Date: 01/10/2023

Degrees Awarded

Degree: Bachelor of Arts
Confer Date: 12/11/2021
Degree Honors: Summa Cum Laude
Plan: Political Science BA/JD
Plan: MINOR - Political Science - American Politics
Plan: MINOR - Pre-Law

Beginning of Law Record

2021 Spring

Program: Law School Full-time Program
Plan: Law Major

Course	Description	Attempted	Earned	Grade	Points
9200 602	Civil Procedure - Fed Litiga	3.000	3.000	A-	11.100
9200 607	Criminal Law	3.000	3.000	A	12.000
9200 609	Fundamentals of Lawyering	0.000	0.000	CR	0.000
9200 619	LARW I	3.000	3.000	A	12.000
9200 645	Property	4.000	4.000	A-	14.800
9200 676	Legislation and Regulation	2.000	2.000	A-	7.400
Term GPA	3.820 Term Totals	15.000	15.000		57.300
Cumulative GPA	3.820 Cumulative Totals	15.000	15.000		57.300

2021 Summer

Program: Law School Full-time Program
Plan: Law Major

Course	Description	Attempted	Earned	Grade	Points
9200 620	LARW II	3.000	3.000	A	12.000
Term GPA	4.000 Term Totals	3.000	3.000		12.000
Cumulative GPA	3.850 Cumulative Totals	18.000	18.000		69.300

2021 Fall

Program: Law School Full-time Program
Plan: Law Major

Course	Description	Attempted	Earned	Grade	Points
9200 601	Civil Procedure - Fed Juris	3.000	3.000	A	12.000
9200 603	Const Law: Govt Authority	3.000	3.000	A	12.000
9200 611	Contracts	4.000	4.000	A	16.000
9200 625	Torts	4.000	4.000	A	16.000
9200 656	Law Review Staff	1.000	1.000	CR	0.000
9200 688	Legal Drafting	2.000	2.000	A	8.000
Term GPA	4.000 Term Totals	17.000	17.000		64.000
Cumulative GPA	3.921 Cumulative Totals	35.000	35.000		133.300

2022 Spring

Program: Law School Full-time Program
Plan: Law Major

Course	Description	Attempted	Earned	Grade	Points
9200 604	Const Law: Individual Rights	3.000	3.000	A-	11.100
9200 612	Professional Responsibility	3.000	3.000	B+	9.900
9200 629	Secured Transactions	3.000	3.000	A	12.000
9200 656	Law Review Staff	1.000	1.000	CR	0.000
9200 661	Environmental Law	3.000	3.000	A-	11.100
Term GPA	3.675 Term Totals	13.000	13.000		44.100
Cumulative GPA	3.857 Cumulative Totals	48.000	48.000		177.400

2022 Summer

Program: Law School Full-time Program
Plan: Law Major

Course	Description	Attempted	Earned	Grade	Points
9200 696	Externship Program	3.000	3.000	CR	0.000
Term GPA	0.000 Term Totals	3.000	3.000		0.000
Cumulative GPA	3.857 Cumulative Totals	51.000	51.000		177.400

2022 Fall

Program: Law School Full-time Program
Plan: Law Major

Course	Description	Attempted	Earned	Grade	Points
LAWX 608	Evidence	3.000	3.000	A	12.000
LAWX 618	Advanced Legal Research	1.000	1.000	A	4.000
LAWX 622	Administr of Criminal Justice	3.000	3.000	A-	11.100
LAWX 658	Law Review Editorial Board	2.000	2.000	CR	0.000
LAWX 669	UCC-Sales	3.000	3.000	A	12.000
LAWX 684	Sem: Selected Legal Problems	3.000	3.000	A	12.000
Course Topic:	Sem: Social Justice				
Term GPA	3.931 Term Totals	15.000	15.000		51.100
Cumulative GPA	3.873 Cumulative Totals	66.000	66.000		228.500

Law Career Totals
Cumulative GPA: 3.873 Cumulative Totals 66.000 66.000 228.500

***** End of Transcript *****

OFFICIAL ACADEMIC TRANSCRIPT

The University of Akron

Ronald L. Bowman, Jr., University Registrar

Name: John Spinner
Student ID: 4281569

SSN: xxx-xx-9928
Birthdate: 01-04-xxxx
Print Date: 11/04/2022

Degrees Awarded

Degree: Bachelor of Arts
Confer Date: 12/11/2021
Degree Honors: Summa Cum Laude
Plan: Political Science BA/JD
Plan: MINOR - Political Science - American Politics
Plan: MINOR - Pre-Law

Transfer Credit

Stark State College

Transfer Total: 6.000

Beginning of Undergraduate Record

2016 Fall

Program: College Credit Plus
Plan: General - Exploratory Non-Degree Seeking

Course	Description	Attempted	Earned	Grade	Points
3470 250	Statistics for Everyday Life	4.000	4.000	A	16.000
Term GPA 4.000	Term Totals	4.000	4.000		16.000
Cumulative GPA 4.000	Cumulative Totals	4.000	4.000		16.000

2018 Fall

Program: Arts & Sciences Undergraduate
Plan: Political Science Major

Course	Description	Attempted	Earned	Grade	Points
3200 289	Mythology of Ancient Greece	3.000	3.000	A	12.000
3580 101	Beginning Spanish I	4.000	4.000	A	16.000
3700 100	Government & Politics in US	3.000	3.000	A	12.000
3850 100	Introduction to Sociology	3.000	3.000	A	12.000
7600 105	Introductn to Public Speaking	3.000	3.000	A	12.000
Term GPA 4.000	Term Totals	16.000	16.000		64.000
Cumulative GPA 4.000	Cumulative Totals	20.000	20.000		80.000

Term Honor: President's List

2019 Spring

Program: Arts & Sciences Undergraduate
Plan: Political Science BA/JD Major

Course	Description	Attempted	Earned	Grade	Points
3230 151	Human Evolution	4.000	4.000	A	16.000
3580 102	Beginning Spanish II	4.000	4.000	A-	14.800
3700 150	World Politics & Government	3.000	3.000	A-	11.100
3700 300	Comparative Politics	3.000	3.000	A	12.000
7500 201	Exploring Music: Bach to Rock	3.000	3.000	A	12.000
Term GPA 3.876	Term Totals	17.000	17.000		65.900
Cumulative GPA 3.943	Cumulative Totals	37.000	37.000		145.900

Term Honor: Dean's List

2019 Summer

Program: Arts & Sciences Undergraduate
Plan: Political Science BA/JD Major

Course	Description	Attempted	Earned	Grade	Points
3370 100	Earth Science	3.000	3.000	A	12.000
3600 120	Introduction to Ethics	3.000	3.000	A	12.000
Term GPA 4.000	Term Totals	6.000	6.000		24.000
Cumulative GPA 3.951	Cumulative Totals	43.000	43.000		169.900

2019 Fall

Program: Arts & Sciences Undergraduate
Plan: Political Science BA/JD Major

Course	Description	Attempted	Earned	Grade	Points
3580 201	Intermediate Spanish I	3.000	3.000	B+	9.900
3700 301	Intro to Political Research	3.000	3.000	A	12.000
3700 303	Intro to Political Thought	3.000	3.000	A-	11.100
3700 336	Homeland Security Policy & Prc	3.000	3.000	A	12.000
3700 350	The American Presidency	3.000	3.000	A	12.000
3700 492	Selected Topics in Pol Sci	3.000	3.000	A	12.000
Course Topic:	ST: Camp Battle: Invisible Pri				
Term GPA 3.833	Term Totals	18.000	18.000		69.000
Cumulative GPA 3.916	Cumulative Totals	61.000	61.000		238.900

Term Honor: Dean's List

2020 Spring

Program: Arts & Sciences Undergraduate
Plan: Political Science BA/JD Major

Course	Description	Attempted	Earned	Grade	Points
2020 121	English	3.000	3.000	A	12.000
3700 395	Intern: Government & Politics	6.000	6.000	A	24.000
3700 397	Indp Study: Political Science	3.000	3.000	A	12.000
Term GPA 4.000	Term Totals	12.000	12.000		48.000
Cumulative GPA 3.930	Cumulative Totals	73.000	73.000		286.900

Term Honor: President's List

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John N Spinner 7700

OSCAR / Spinner, John (University of Akron School of Law)